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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 473

BOARD OF PUBLIC WORKS OF MARYLAND, ET AL.,

Petitioners,

v.

THE HORACE MANN LEAGUE OF THE UNITED STATES OF AMERICA, INC., ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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PRAYER FOR WRIT

The Board of Public Works of Maryland, The Saint Joseph College of the Daughters of Charity of Saint Vincent de Paul, Inc. (Saint Joseph College), The College of Notre Dame of Maryland, Inc. (the College of Notre Dame), and Western Maryland College pray that a writ of certiorari be issued to review the judgment of the Court of Appeals of Maryland, entered in the above-entitled case on June 2, 1966. That judgment, entered in

a suit brought by complaining taxpayers* and the Horace Mann League, enjoined the payment by officials of the State of Maryland of matching funds appropriated by the state legislature to three private liberal arts colleges for the construction of science buildings and a dining hall. The court held that each of the colleges concerned was so closely affiliated with a religious denomination as to be a "sectarian" institution and that the appropriation of state funds to such an institution for the purposes indicated amounted to the establishment of a religion in violation of the first and fourteenth amendments of the federal constitution.

CITATIONS TO OPINIONS BELOW

The opinion of the Circuit Court for Anne Arundel County is unreported. It is printed at pp. 58-79 of Volume I of the joint record extract filed in the court below and with this petition. It is also printed in appendix B (p. 71a) to this petition. The opinion of the Court of Appeals of Maryland is reported in 242 Md. 645 and is printed in appendix B (p. 17a).

JURISDICTION

The judgment of the Court of Appeals sought to be reviewed was entered on June 2, 1966. A petition for rehearing filed by the Board of Public Works and a peti-

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* The court held that the Horace Mann League lacked standing to bring the suit but that the individual plaintiffs, the respondents here, had shown a sufficient interest as taxpayers to do so. The respondent taxpayers are: Robert E. Allen, Jr., John D. Elder, Fred M. Felmet, Jr. and Adelaide C. Felmet, William L. Gouline, Doris E. Hadary, Mildred Harkness and Elmer C. Harkness, Jr., James L. Llewellyn and Gertrude C. Llewellyn, Dr. Albert R. Wilkerson, Raymond Keith Winters and Carey Jennings Winters.

tion for rehearing filed by Saint Joseph College and College of Notre Dame were denied June 28, 1966. A petition for rehearing filed by Western Maryland College was denied July 25, 1966. The jurisdiction of this court is invoked under 28 U.S.C., Section 1257(3), since three Maryland statutes printed in appendix A to this petition (beginning at p. 1a) have been held invalid by the highest court of the state on the ground that they are repugnant to the first and fourteenth amendments to the constitution of the United States. The court found that the statutes did not conflict with any provision of the Maryland constitution and expressly based its holding of invalidity solely on its interpretation of the federal constitution.

THE QUESTION PRESENTED

Do the first and fourteenth amendments to the constitution of the United States prohibit as an establishment of religion the appropriation of state funds to construct science buildings and a dining hall at private liberal arts colleges, regardless of any secular public purposes served thereby, merely because the institutions are considered to be "sectarian"?

STATUTES INVOLVED

The statutory provisions involved are: Chapter 546 of the 1963 Acts of the General Assembly of Maryland, found at p. 973 of the Laws of Maryland, 1963; Chapter 545 of the 1963 Acts of the General Assembly of Maryland, found at p. 970 of the Laws of Maryland, 1963; and Chapter 66 of the 1962 Acts of the General Assembly of Maryland, found at p. 219 of the Laws of Maryland,

1962.* They are printed in appendix A to this petition, beginning at p. 1a.

STATEMENT OF THE CASE

In 1962 and 1963 the General Assembly of Maryland, in pursuance of a state policy of aiding private colleges (including those with sectarian affiliations) which dates back to 1784, enacted four bills, each of which provided for the sale of certificates of indebtedness of the State of Maryland and for the payment of the net proceeds of the sale to a church-related college for use on a matching-fund basis for the construction of one or more buildings to be used for educational purposes. In the cases of Saint Joseph College and the College of Notre Dame, the funds were to be used for the erection of science buildings; in the case of Western Maryland College for a dining hall and a science wing; in the case of Hood College of Frederick, Maryland, for the construction of a dormitory and classroom building.

These bills were signed by the Governor of Maryland, but before any certificates of indebtedness had been issued, the respondents filed a bill of complaint in the Circuit Court for Anne Arundel County, Maryland, challenging the validity of all four statutes. The bill of complaint charges that the proposed expenditures of state funds "violate the First Amendment to the Constitution of the United States of America, as made applicable to the State of Maryland by the Fourteenth Amendment to said Constitution, in that they constitute in each case a

* Since the Court of Appeals upheld the validity of the statute relating to Hood College, it is not included among the statutes involved in this petition.

law respecting an establishment of religion . . . by the State of Maryland." (E. 12-13)* The bill prays a declaration of the invalidity of each statute and an injunction prohibiting the payment of the funds.

After a trial of almost three weeks, the trial court found that while each of the colleges is affiliated with a particular religious denomination, each of them is primarily a liberal arts college affording its students educational opportunities which are the equivalent of those offered at a secular college. (E. 60-62, 77) The trial court also found that the "grants . . . are for the construction of secular college buildings in no way connected with religion." (E. 74) The court explicitly found on the basis of uncontradicted testimony that the scientific instruction at each of the four colleges did not differ materially from that afforded by a secular institution. (E. 77) The trial court then held that no provision of either state or federal constitutitions prohibits the questioned grants (E. 69-79) and dismissed the bill.

The original plaintiffs appealed to the Court of Appeals of Maryland. (E. 6) As the first question they wished that court to consider, they asked: "Did the trial court err in holding that the grants in this case were not an establishment of religion and a deprivation of the liberty and property of plaintiffs and others similarly situated, without due process of law in violation of the First and Fourteenth Amendments to the Federal Constitution?" (Respondents' Brief in the Court of Appeals of Maryland, p. 3) This issue was fully briefed and argued by the respondents and the petitioners. The Court

* References are to the joint record extract filed in the court below and filed in this court with this petition.

of Appeals of Maryland, in a 4-3 decision,* held that Western Maryland "is sectarian in a legal sense under the First Amendment, and may not constitutionally receive the grant named in the Bill." (242 Md. at 678) The court went on to make a similar holding as to the College of Notre Dame and Saint Joseph College. (242 Md. at 684) The statutes authorizing the grants to these three colleges were accordingly held to be invalid and unconstitutional as in conflict with the "Establishment Clause" of the federal constitution. (242 Md. at pp. 679, 684)

On the other hand, the Court of Appeals unanimously agreed with the trial court that none of the four statutes violated any provisions of the Maryland constitution (including the express provision of Article 36 of the Maryland bill of rights that no person "ought * * * to be compelled to frequent, or maintain, or contribute, unless on contract, to maintain any place of worship, or any ministry"). In that connection the court said: "The grants here under consideration (if effectuated) are clearly ones to be expended for public uses: to assist in educating our citizens." (242 Md. at 685) The court further held unanimously that the legislature might validly appropriate funds for the construction of educational facilities at Hood College, since that institution, while affiliated with a particular religious denomination, was not "sectarian".

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* Of the 7 judges of the court, 2 disqualified themselves. One of these has since expressed grave doubts as to the correctness of the decision of the majority in this case. (See concurring opinion of Barnes, J. in *Truitt v. Board of Public Works of Maryland*, ... Md. ....., filed July 22, 1966.) Thus, the decision of the majority below represents the views of only two of the regularly assigned judges of the highest court of the State of Maryland. Their votes, together with the votes of two trial judges specially assigned to sit in this case, have prevailed over the views of a majority of their colleagues.

REASONS FOR GRANTING THE WRIT

I.

The Case Presents an Issue of Great Public Importance

It is common knowledge that in recent years our institutions of higher education have been flooded with applicants. Moreover, during the next decade this trend is expected to continue. The latest official predictions indicate that during that period the enrollment of students in the nation's colleges and universities will increase by more than 50% and that the total cost of educating the students in these institutions will approximately double.* In an increasingly complex society, the facilities and staff of every existing institution of higher education in this country must be utilized to the fullest extent possible if these young men and women are to receive the best education of which they are capable. Moreover, if the political, economic and social problems generated by a population which is rapidly approaching the 200 million mark are to be met, the nation simply cannot afford not to give this opportunity to its youth.

Recognizing these facts, the federal government, since the end of World War II, has enormously increased its support of institutions of higher education, including private colleges, regardless of their religious affiliation.**

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* See "Projections of Educational Statistics to 1974-75, U.S. Department of Health, Education and Welfare (Superintendent of Documents Catalog No. FS 5.210:10030-65).

** Federal support for denominational institutions of higher education dates back to the late 18th century in the Ohio Company Land Sale Ordinance of July 23, 1787. Other notable instances of such support are the Morrill Land-Grant Acts of 1862 and 1890 (12 Stat. 503 and 26 Stat. 417). See Rivlin, "The Role of the Federal Government in Financing Higher Education", pp. 9-20, Brookings Institution, Washington, D.C. (1961). Maryland has consistently aided such institutions since 1784. See opinion of dissenting judges below, 242 Md. at 691-2.

Many of the principal programs are described in a pamphlet entitled "Constitutionality of Federal Aid to Education in its Various Aspects," printed as Senate Document No. 29, 87th Congress, First Session, pursuant to Senate Resolution 126, adopted May 1, 1961. The programs listed there, together with certain ones omitted and others added by subsequent legislation, are briefly described in appendix C to this petition (beginning at p. 92a). See also Rafalko, "Federal Aid to Private School Controversy: A Look," 3 Duquesne University Law Review 211 (1965).

In the preamble to The Higher Education Facilities Act of 1963, express recognition is given by Congress to the facts stated above. (See 77 Stat. 363, 20 U.S.C.A. 701, 1965 Supp.) The legislative findings embodied in that preamble were based on testimony given before Congressional committees by representatives of the American Council on Education and other organizations which strongly urged Congress not to withhold its aid from any accredited institution of higher education. See U.S. Code Congressional and Administrative News, 88th Cong., 1st Sess., pp. 1174-1177 (1963). See also Hearings on H.R. 967, H.R. 2218, H.R. 4267, H.R. 4415, H.R. 5467, H.R. 10942, H.R. 11250 (college classroom construction), before a subcommittee of the House Committee on Education and Labor (Statement of Hon. Arthur S. Fleming) 86th Cong., 2nd Sess., pp. 24-28 (1960); and Hearings on H.R. 5266 (college academic facilities construction), before a subcommittee of the House Committee on Education and Labor (Statement of Hon. Arthur S. Fleming) 87th Cong., 1st Sess., pp. 130-133 (1961). Thus, Congress has explicitly recognized that if the present crisis in higher education is to be met, the nation must utilize the services of so-called denominational colleges, of which,

according to the official tabulation of the Department of Health, Education and Welfare, there are now 842.*

The programs undertaken pursuant to the legislation in aid of higher education have resulted in the expenditure of more than two billion dollars annually (E. 728-29) and have transformed the entire financial structure of higher education in this country. See Orlans, "The Effects of Federal Programs on Higher Education," The Brookings Institution, Washington, D.C. (1962). It is no exaggeration to say that any college or university which is denied the right to participate in these programs is condemned to hopeless inferiority and in all probability, to ultimate extinction. See Hearings on S. 2097 before a subcommittee of the Senate Committee on the Judiciary (Statement of John T. Fey representing the American Council on Education and the Association of American Colleges) 89th Cong., 2nd Sess. Part 1, pp. 183, 186 (1966).

The present suit draws in question the right of any college or university with substantial affiliations with a particular religious denomination to participate in any of these programs.** The decision of the Maryland court will, of course, bring to an abrupt halt the long standing policy of the State of Maryland to aid private colleges,

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* Education Directory 1962-63, Part 3, Higher Education, U.S. Department of Health, Education and Welfare, Office of Education, Superintendent of Documents No. FS 5.25:962-63/Part III, p. 14.

** While the Senate was debating the necessity for adding to The Higher Education Facilities Act of 1963 a provision for judicial review of the constitutional validity of grants made thereunder, Senator Morse, who managed the bill on the floor, contended that such a provision was unnecessary and cited the present litigation as one which would afford an appropriate means of deciding the issue which was being raised by Senators who were questioning the validity of providing facilities to colleges with substantial religious affiliations. 109 Cong. Rec. Senate (daily edition 1963) 18256-7, 18508, 18525, 22895. See also 77 Harvard Law Review 1353 (1963-64).

including those with substantial religious affiliations, through grants of funds to be used for facilities and scholarships — a policy on which the state has been counting as a means of meeting its share of the rapidly growing burden of educating the youth of the nation. (Second Annual Report of the State of Maryland Advisory Council for Higher Education, January, 1966, p. 4-5, and p. 4-13). But it is bound to have an impact far beyond the borders of the state and to create confusion in the administration of federal programs which would be inoperable without the action of state officials, paid from state revenues. See, for example, Section 105 of The Higher Education Facilities Act of 1963 (77 Stat. 367 as amended by 79 Stat. 1267, 20 U.S.C.A. 715, 1965 Supp.), and Section 105 of The Higher Education Act of 1965 (79 Stat. 1220, 20 U.S.C.A. 1005, 1965 Supp.). See also Section 203 of Title II of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 241e) which has produced conflicting opinions from various state law departments. See opinion of Department of Justice, State of Oregon, dated July 29, 1966. See also editorial, "School Policy Void", *The New York Times,* August 17, 1966.

Thus, the judgment which this court is now being asked to review involves a matter of the greatest public importance. Indeed, it presents what may fairly be characterized as the single most important issue in the field of church-state relationships which remains undecided by this court.

II.

The Matter is Ripe for Review

As has been indicated, the federal government has already entered upon an extensive program of aid to

private liberal arts colleges and universities without regard to their sectarian affiliation. The validity of this program has been cast in doubt by the decision below, and a definitive ruling by this court is urgently required. The issues involved have been canvassed in innumerable publications, and the court will find no lack of discussion of almost every facet of the question. Attached, as appendix D (beginning at p. 108a), is a partial bibliography which will give some indication of the extent and character of these publications.

Accordingly, the question is ripe for decision, and it is submitted that no useful purpose can be served by postponing its consideration. Indeed, the only effect of such postponement would be to involve a large number of important institutions of higher education in an ever deeper quagmire of doubt and confusion on a matter vital to their welfare.

III.

The Maryland Court has Misinterpreted the Decisions of this Court

The previous decisions of this court offer no clear guide to the resolution of the problem presented in the present case. As Professor Kurland aptly put it, "Anyone suggesting that the answer [to this question] is clear one way or the other is either deluding or deluded." Kurland, "Religion and the Law", p. 111, Aldine Pub. Co. (1962). From *Bradfield v. Roberts,* 175 U.S. 291, to *Abington School District v. Schempp,* 374 U.S. 203, many utterances may be found which seem to point to different answers to the question which the Maryland court has decided.

The majority of the court below, although expressly finding that the statutes in question were on their face not intended to aid religion and that they achieved an important secular purpose, namely, the providing of college students with adequate facilities for scientific instruction and dining, nevertheless concluded that since the institutions involved were substantially affiliated with particular religious denominations, no state aid could be given to them even to achieve a secular public purpose. Your petitioners submit that in so holding, the majority of the court has misinterpreted and misapplied the decisions of this court. While for the reasons stated above, it is impossible to speak with certainty on this subject, we believe that fairly interpreted, the decisions of this court establish the following propositions:

1. The authority of the state may not be placed behind regulations which require religious exercises or religious instruction.

2. The state may not give direct financial support to religious institutions such as churches, seminaries, convents, and the like, since any secular benefits flowing from such support are by-products of religious activities.

3. The appropriation of funds for purposes which benefit private educational institutions operated under religious auspices is permissible where the primary object of the appropriation is to achieve a secular purpose and where that purpose is achieved not as a by-product of religion but by non-religious means specifically directed to the secular end.

Measured by these principles, we submit that the statutes here involved are plainly valid.

CONCLUSION

It is for these reasons that we urge that this petition should be granted.

Respectfully submitted,

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APPENDIX A

CHAPTER 546

(Senate Bill 642)

AN ACT to authorize the creation of a State debt in the aggregate amount of Five Hundred Thousand Dollars ($500,000.00) for the purpose of aiding in the construction of a new science wing to Lewis Hall and a new dining hall on the campus of Western Maryland College, in Westminster, subject to the requirements that the said College, on or before January 1, 1965, shall have obtained elsewhere at least an equal and matching sum for the same purposes; and providing generally for the issue and sale of certificates of indebtedness evidencing this loan.

SECTION 1. *Be it enacted by the General Assembly of Maryland,* That the Board of Public Works is hereby authorized and directed to issue a State loan to be known as the "Western Maryland College Loan of 1963", in the aggregate sum of Five Hundred Thousand Dollars ($500,000.00).

The certificates evidencing said loan may be issued all at one time or, in groups, from time to time, as hereinafter provided. All of said certificates evidencing said loan, or any group thereof, shall be issued according to what is known as the serial annuity plan so worked out as to discharge the principal represented by said certificates within fifteen (15) years from the time of its issue; provided, however, that it shall not be necessary to provide for the redemption of any part of the principal represented by any certificate for the first two (2) years from the time of the issuance of said certificates.

The Board of Public Works shall, and is hereby authorized and empowered to, pass a resolution or resolutions from time to time, determining and setting forth:

(a) The proportion of the total loan authorized by this Act which shall be issued at any particular time;

(b) The form of the certificate representing the loan or any part thereof so authorized to be issued at any particular time, including any interest coupons to be attached thereto, and provisions for the issuance of certificates in registered form, provisions for the registration of any coupon certificates as to principal of loan and for the reconversion into coupon certificates of any certificates registered as to principal.

(c) The denomination or denominations of the certificates to be issued at any particular time, which may be not less than One Hundred Dollars ($100) but may be in sums of One Hundred Dollars ($100) or any suitable multiple thereof, and the place or places of payment of principal and interest thereof.

(d) The rate of interest of the certificates to be issued at any particular time not exceeding in any case 4% per annum, payable semi-annually.

(e) The date of the certificates issued at any particular time, and within the limits prescribed by Article III, Section 34 of the Constitution of Maryland the redemption dates of said certificates.

The resolution authorizing the issuance of said loan or any portion thereof shall set forth in detail the dates when any of the certificates representing said loan or any portion thereof are to be redeemed and the amount to be redeemed upon such dates respectively, according to the serial annuity plan applied to said loan as a whole or to the group of certificates evidencing a part of said loan issued at a particular time, as the case may be. Said loan and certificates and every part thereof and the interest payable thereon shall be and remain exempt from State, County and municipal taxation.

SEC. 2. *And be it further enacted,* That the Board of Public Works is hereby authorized and directed to have prepared proper Certificates of Indebtedness of the State in good and sufficient form to aggregate the amount of Five Hundred Thousand Dollars ($500,000.00) as evidence

of such loan; such Certificates of Indebtedness shall bear date as of the time of their issue as provided in Section 1 of this Act. Each of said certificates shall be signed and countersigned in the manner prescribed by Section 3 of Article VI of the Maryland Constitution.

SEC. 3. *And be it further enacted,* That in order to provide for the selling of the Certificates of Indebtedness aforesaid, to be issued under the provisions of this Act, the Board of Public Works is hereby directed to advertise once before the said Certificates of Indebtedness, or any part thereof, shall be issued, in two newspapers published in the City of Baltimore and in such other manner as the Board of Public Works in its discretion may determine, that the Treasurer of this State will be in readiness at a time within twenty (20) days after expiration of said notice to receive bids at such place or places as may be named in said respective advertisements for bonds or Certificates of Indebtedness issued under the provisions of this Act, under such regulations as may be made in the discretion of the Board of Public Works; and the accrued interest between the date of the bonds or Certificates of Indebtedness and the time of sale and delivery of and payments for said bonds or Certificates of Indebtedness shall be adjusted with the purchaser thereof under such regulations as may be made in the discretion of the Board of Public Works; and upon the day mentioned in said advertisement as the day for opening the bids for the proposals thereby called for, they shall receive such sealed proposals for the purchase of as many of such bonds or Certificates of Indebtedness as may be mentioned or designated in said advertisements; and on the opening of such sealed proposals, as many of said bonds or Certificates of Indebtedness as have been so bid for shall be awarded by the Board of Public Works, to the highest responsible bidder or bidders therefor for cash, if the prices bid are adequate, in the judgment of the Board of Public Works, and when two or more bidders have made the same bid, and such bid is the highest and the Certificates so bid for by the highest responsible bidder are in excess of the whole amount of the Certificates offered for sale, such

bonds or Certificates of Indebtedness shall be awarded to such responsible bidders bidding the same price in a ratable proportion; or if any insufficient price be bid for them, they may be subsequently disposed of under the direction of the Board of Public Works at a private sale upon the best terms they can obtain for the same; provided, they shall not be sold at private sale for less than par and accrued interest.

SEC. 4. *And be it further enacted,* That the sum of Ten Thousand Dollars ($10,000), or so much thereof, as may be necessary, shall be paid by the Treasurer of the State upon the warrant of the Comptroller out of the proceeds of the sale of said bonds or Certificates of Indebtedness, for the payment of the expense of engraving, printing and other outlays connected with the issue of the loan hereby authorized and for the payment of the advertising directed by this Act, and all other incidental expenses connected with the execution of its provisions in connection with said loan.

SEC. 5. *And be it further enacted,* That the actual cash proceeds of the sale of the Certificates of Indebtedness to be issued under this Act shall be paid to the Treasurer of the State upon the warrant of the Comptroller and such proceeds shall be used exclusively for the following purposes, to wit:

The Comptroller shall immediately upon the sale of and payment for said certificates, first return to and credit the Treasury for a sum equivalent to the amount expended as provided for in Section 4 of this Act; the remainder of the proceeds of said loan shall be credited on the books of the State Treasury Department, to be expended as needed by the State, upon approval by the Board of Public Works, for the purpose of aiding in the construction of a new science wing to Lewis Hall and a new dining hall on the campus of Western Maryland College in Westminster.

SEC. 6. *And be it further enacted,* That the payment of any funds under the provisions of this Act, for the purpose of aiding in the construction of a new science wing to Lewis

Hall and a new dining hall on the campus of Western Maryland College in Westminster, shall be contingent upon the provisions by Western Maryland College of at least an equal and matching fund from other sources, including the Federal government. The said College shall have until January 1, 1965, to present evidence satisfactory to the Board of Public Works that it has raised at least this equal and matching fund for the purpose of aiding in the construction of a new science wing to Lewis Hall and a new dining hall on the campus of Western Maryland College in Westminster. Upon receiving from the Board of Public Works a certification of such suitable evidence on or before January 1, 1965, the Treasurer of the State is hereby authorized, empowered and directed to proceed to spend the proceeds of said loan agreeably to the other provisions of this Act. If such satisfactory evidence of the raising of at least an equal and matching fund is not presented to the Board of Public Works on or before January 1, 1965, no funds under the provisions of this Act shall thereafter be paid over to or expended for the purpose of aiding in the construction of a new science wing to Lewis Hall and a new dining hall on the campus of Western Maryland College in Westminster.

SEC. 7. *And be it further enacted*, That until all of the interest on and principal of any certificates issued under this Act have been paid in full, there is hereby levied and imposed an annual State tax on each $100 of assessable property at the rate to be determined in the following manner: on or before December 1, 1963, and on or before December 1 in each calendar year thereafter, the Board of Public Works shall certify to the governing bodies of each of the Counties and Baltimore City the rate of State tax on each $100 of assessable property necessary to produce revenues to meet all interest and principal which will be payable to the close of the next ensuing calendar year on all certificates theretofore issued or theretofore authorized by resolution of the Board of Public Works to be issued, and the governing bodies of each of the Counties and Baltimore City shall forthwith levy and collect such tax at such rate.

All matters committed by this Act to the discretion of the Board of Public Works shall be determined by a majority of said Board.

SEC. 8. *And be it further enacted,* That this Act shall take effect June 1, 1963.

Approved April 30, 1963.

CHAPTER 545

(Senate Bill 641)

AN ACT to authorize the creation of a State debt in the aggregate amount of Seven Hundred and Fifty Thousand Dollars ($750,000.00) for the purpose of aiding in the construction of a new science building on the campus of St. Joseph College of the Daughters of Charity of St. Vincent de Paul, Inc., in Emmitsburg, subject to the requirements that the said College, on or before January 1, 1965, shall have obtained elsewhere at least an equal and matching sum for the same purposes; and providing generally for the issue and sale of certificates of indebtedness evidencing this loan.

SECTION 1. *Be it enacted by the General Assembly of Maryland,* That the Board of Public Works is hereby authorized and directed to issue a State loan to be known as the "St. Joseph College Loan of 1963", in the aggregate sum of Seven Hundred and Fifty Thousand Dollars ($750,000.00).

The certificates evidencing said loan may be issued all at one time or, in groups, from time to time, as hereinafter provided. All of said certificates evidencing said loan, or any group thereof, shall be issued according to what is known as the serial annuity plan so worked out as to discharge the principal represented by said certificates within fifteen (15) years from the time of its issue; provided, however, that it shall not be necessary to provide for the redemption of any part of the principal represented by any certificate for the first two (2) years from the time of the issuance of said certificates.

The Board of Public Works shall, and is hereby authorized and empowered to, pass a resolution or resolutions from time to time, determining and setting forth:

(a) The proportion of the total loan authorized by this Act which shall be issued at any particular time;

(b) The form of the certificate representing the loan or any part thereof so authorized to be issued at any particular time, including any interest coupons to be attached thereto, and provisions for the issuance of certificates in registered form, provisions for the registration of any coupon certificates as to principal of loan and for the reconversion into coupon certificates of any certificates registered as to principal.

(c) The denomination or denominations of the certificates to be issued at any particular time, which may be not less than One Hundred Dollars ($100) but may be in sums of One Hundred Dollars ($100) or any suitable multiple thereof, and the place or places of payment of principal and interest thereof.

(d) The rate of interest of the certificates to be issued at any particular time not exceeding in any case 4% per annum, payable semi-annually.

(e) The date of the certificates issued at any particular time, and within the limits prescribed by Article III, Section 34 of the Constitution of Maryland the redemption dates of said certificates.

The resolution authorizing the issuance of said loan or any portion thereof shall set forth in detail the dates when any of the certificates representing said loan or any portion thereof are to be redeemed and the amount to be redeemed upon such dates respectively, according to the serial annuity plan applied to said loan as a whole or to the group of certificates evidencing a part of said loan issued at a particular time, as the case may be. Said loan and certificates and every part thereof, and the interest payable thereon shall be and remain exempt from State, County and municipal taxation.

SEC. 2. *And be it further enacted,* That the Board of Public Works is hereby authorized and directed to have prepared proper Certificates of Indebtedness of the State in good and sufficient form to aggregate the amount of Seven Hundred and Fifty Thousand Dollars ($750,000.00) as evidence of such loan; such Certificates of Indebtedness shall bear date as of the time of their issue as provided in Section 1 of this Act. Each of said certificates shall be signed and countersigned in the manner prescribed by Section 3 of Article VI of the Maryland Constitution.

SEC. 3. *And be it further enacted,* That in order to provide for the selling of the Certificates of Indebtedness aforesaid, to be issued under the provisions of this Act, the Board of Public Works is hereby directed to advertise once before the said Certificates of Indebtedness, or any part thereof, shall be issued, in two newspapers published in the City of Baltimore and in such other manner as the Board of Public Works in its discretion may determine, that the Treasurer of this State will be in readiness at a time within twenty (20) days after expiration of said notice to receive bids at such place or places as may be named in said respective advertisements for bonds or Certificates of Indebtedness issued under the provisions of this Act, under such regulations as may be made in the discretion of the Board of Public Works; and the accrued interest between the date of the bonds or Certificates of Indebtedness and the time of sale and delivery of and payments for said bonds or Certificates of Indebtedness shall be adjusted with the purchaser thereof under such regulations as may be made in the discretion of the Board of Public Works; and upon the day mentioned in said advertisement as the day for opening the bids for the proposals thereby called for, they shall receive such sealed proposals for the purchase of as many of such bonds or Certificates of Indebtedness as may be mentioned or designated in said advertisements; and on the opening of such sealed proposals, as many of said bonds or Certificates of Indebtedness as have been so bid for shall be awarded by the Board of Public Works, to the highest responsible bidder or bidders therefor for cash, if the prices bid are adequate, in the judgment of the Board

of Public Works, and when two or more bidders have made the same bid, and such bid is the highest and the Certificates so bid for by the highest responsible bidder are in excess of the whole amount of the Certificates offered for sale, such bonds or Certificates of Indebtedness shall be awarded to such responsible bidders bidding the same price in a ratable proportion; or if any insufficient price be bid for them, they may be subsequently disposed of under the direction of the Board of Public Works at a private sale upon the best terms they can obtain for the same; provided, they shall not be sold at private sale for less than par and accrued interest.

SEC. 4. *And be it further enacted,* That the sum of Ten Thousand Dollars ($10,000), or so much thereof, as may be necessary, shall be paid by the Treasurer of the State upon the warrant of the Comptroller out of the proceeds of the sale of said bonds or Certificates of Indebtedness, for the payment of the expense of engraving, printing and other outlays connected with the issue of the loan hereby authorized and for the payment of the advertising directed by this Act, and all other incidental expenses connected with the execution of its provisions in connection with said loan.

SEC. 5. *And be it further enacted,* That the actual cash proceeds of the sale of the Certificates of Indebtedness to be issued under this Act shall be paid to the Treasurer of the State upon the warrant of the Comptroller and such proceeds shall be used exclusively for the following purposes, to wit:

The Comptroller shall immediately upon the sale of and payment for said certificates, first return to and credit the Treasury for a sum equivalent to the amount expended as provided for in Section 4 of this Act; the remainder of the proceeds of said loan shall be credited on the books of the State Treasury Department, to be expended as needed by the State, upon approval by the Board of Public Works, for the purpose of aiding in the construction of a new science building on the campus of St. Joseph College of the Daughters of Charity of St. Vincent de Paul, Inc., in Emmitsburg.

SEC. 6. *And be it further enacted*, That the payment of any funds under the provisions of this Act, for the purpose of aiding in the construction of a new science building on the campus of St. Joseph College of the Daughters of Charity of St. Vincent de Paul, Inc., in Emmitsburg, shall be contingent upon the provision by said St. Joseph College of at least an equal and matching fund from other sources, including the Federal government. The said College shall have until January 1, 1965, to present evidence satisfactory to the Board of Public Works that it has raised at least this equal and matching fund for the purpose of aiding in the construction of a new science building on the campus of St. Joseph College of the Daughters of Charity of St. Vincent de Paul, Inc., in Emmitsburg. Upon receiving from the Board of Public Works a certification of such suitable evidence on or before January 1, 1965, the Treasurer of the State is hereby authorized, empowered and directed to proceed to spend the proceeds of said loan agreeably to the other provisions of this Act. If such satisfactory evidence of the raising of at least an equal and matching fund is not presented to the Board of Public Works on or before January 1, 1965, no funds under the provisions of this Act shall thereafter be paid over to or expended for the purpose of aiding in the construction of a new science building on the campus of St. Joseph College of the Daughters of Charity of St. Vincent de Paul, Inc., in Emmitsburg.

SEC. 7. *And be it further enacted*, That until all of the interest on and principal of any certificates issued under this Act have been paid in full, there is hereby levied and imposed an annual State tax on each $100 of assessable property at the rate to be determined in the following manner: on or before December 1, 1963, and on or before December 1 in each calendar year thereafter, the Board of Public Works shall certify to the governing bodies of each of the Counties and Baltimore City the rate of State tax on each $100 of assessable property necessary to produce revenues to meet all interest and principal which will be payable to the close of the next ensuing calendar year on all certificates theretofore issued or theretofore authorized by resolution of the Board of Public Works to be issued, and

the governing bodies of each of the Counties and Baltimore City shall forthwith levy and collect such tax at such rate.

All matters committed by this Act to the discretion of the Board of Public Works shall be determined by a majority of said Board.

SEC. 8. *And be it further enacted,* That this Act shall take effect June 1, 1963.

Approved April 30, 1963.

CHAPTER 66

(Senate Bill 134)

AN ACT to authorize the creation of a State debt in the aggregate amount of seven hundred and fifty thousand dollars ($750,000) for the purpose of aiding in the construction of a new science building on the campus of the College of Notre Dame of Maryland, in Baltimore City, subject to the requirements that the said College, on or before January 1, 1964, shall have obtained elsewhere at least an equal and matching sum for the same purposes; and providing generally for the issue and sale of certificates of indebtedness evidencing this loan.

WHEREAS, The College of Notre Dame of Maryland, located in Baltimore City, is an old and distinguished institution of higher education, having contributed over many years to the education of the youth of Maryland; and

WHEREAS, As a means of furthering its educational potential, the College of Notre Dame of Maryland has begun a campaign to provide a new science building; and

WHEREAS, This building would add vitally to the facilities of the College of Notre Dame of Maryland, and would enable it to render even more valuable services than in the past to the young people of Maryland; and

WHEREAS, Participation by the State of Maryland in this most worthwhile venture would not only help in educating

the young people of Maryland, but also would relieve greatly crowded facilities in the several State institutions of higher education; now, therefore,

SECTION 1. *Be it enacted by the General Assembly of Maryland*, That the Board of Public Works is hereby authorized and directed to issue a State loan to be known as the "College of Notre Dame of Maryland Loan of 1962", in the aggregate sum of seven hundred and fifty thousand dollars ($750,000).

The certificates evidencing said loan may be issued all at one time or, in groups, from time to time, as hereinafter provided. All of said certificates evidencing said loan, or any group thereof, shall be issued according to what is known as the serial annuity plan so worked out as to discharge the principal represented by said certificates within fifteen (15) years from the time of its issue; provided, however, that it shall not be necessary to provide for the redemption of any part of the principal represented by any certificates for the first two (2) years from the time of the issuance of said certificates.

The Board of Public Works shall, and is hereby authorized and empowered to, pass a resolution or resolutions from time to time, determining and setting forth:

(a) The proportion of the total loan authorized by this Act which shall be issued at any particular time;

(b) The form of the certificate representing the loan or any part thereof so authorized to be issued at any particular time, including any interest coupons to be attached thereto, and provisions for the issuance of certificates in registered form, provisions for the registration of any coupon certificates as to principal of loan and for the reconversion into coupon certificates of any certificates registered as to principal.

(c) The denomination or denominations of the certificates to be issued at any particular time, which may be not less than One Hundred Dollars ($100) but may be in sums of One Hundred Dollars ($100) or any suitable multiple

thereof, and the place or places of payment of principal and interest thereof.

(d) The rate of interest of the certificates to be issued at any particular time not exceeding in any case 4% per annum, payable semi-annually.

(e) The date of the certificates issued at any particular time, and within the limit prescribed by Article III, Section 34 of the Constitution of Maryland the redemption dates of said certificates.

The resolution authorizing the issuance of said loan or any portion thereof shall set forth in detail the dates when any of the certificates representing said loan or any portion thereof are to be redeemed and the amount to be redeemed upon such dates, respectively, according to the serial annuity plan applied to said loan as a whole or to the group of certificates evidencing a part of said loan issued at a particular time, as the case may be. Said loan and certificates and every part thereof and the interest payable thereon shall be and remain exempt from State, County and municipal taxation.

SEC. 2. *And be it further enacted,* That the Board of Public Works is hereby authorized and directed to have prepared proper certificates of indebtedness of the State in good and sufficient form to aggregate the amount of seven hundred and fifty thousand dollars ($750,000), as evidence of such loan; such certificates of indebtedness shall bear date as of the time of their issue as provided in Section 1 of this Act. Each of said certificates shall be signed and countersigned in the manner prescribed by Section 3 of Article VI of the Maryland Constitution.

SEC. 3. *And be it further enacted,* That in order to provide for the selling of the certificates of indebtedness aforesaid, to be issued under the provisions of this Act, the Board of Public Works is hereby directed to advertise once before the said certificates of indebtedness, or any part thereof, shall be issued, in two newspapers published in the City of Baltimore and in such other manner as the Board of Public Works in its discretion may determine, that the

Treasurer of this State, will be in readiness at a time within twenty (20) days after expiration of said notice to receive bids at such place or places as may be named in said respective advertisements for bonds or certificates of indebtedness issued under the provisions of this Act, under such regulations as may be made in the discretion of the Board of Public Works; and the accrued interest between the date of the bonds or certificates of indebtedness and the time of sale and delivery of and payments for said bonds or certificates of indebtedness shall be adjusted with the purchaser thereof under such regulations as may be made in the discretion of the Board of Public Works; and upon the day mentioned in said advertisement as the day for opening the bids for the proposals thereby called for, they shall receive such sealed proposals for the purchase of as many of such bonds or certificates of indebtedness as may be mentioned or designated in said advertisements; and on the opening of such sealed proposals, as many of said bonds or certificates of indebtedness as have been so bid for shall be awarded by the Board of Public Works, to the highest responsible bidder or bidders therefor for cash, if the prices bid are adequate, in the judgment of the Board of Public Works, and when two or more bidders have made the same bid, and such bid is the highest and the certificates so bid for by the highest responsible bidder are in excess of the whole amount of the certificates offered for sale, such bonds or certificates of indebtedness shall be awarded to such responsible bidders bidding the same price in a ratable proportion; or if any insufficient price be bid for them, they may be subsequently disposed of under the direction of the Board of Public Works at a private sale upon the best terms they can obtain for the same; provided, they shall not be sold at private sale for less than par and accrued interest.

SEC. 4. *And be it further enacted,* That the sum of Ten Thousand Dollars ($10,000), or so much thereof as may be necessary, shall be paid by the Treasurer of the State upon the warrant of the Comptroller out of the proceeds of the sale of said bonds or certificates of indebtedness, for the payment of the expense of engraving, printing and other

outlays connected with the issue of the loan hereby authorized and for the payment of the advertising directed by this Act, and all other incidental expenses connected with the execution of its provisions in connection with said loan.

SEC. 5. *And be it further enacted,* That the actual cash proceeds of the sale of the certificates of indebtedness to be issued under this Act shall be paid to the Treasurer of the State upon the warrant of the Comptroller and such proceeds shall be used exclusively for the following purposes, to wit:

The Comptroller shall immediately upon the sale of and payment for said certificates, first return to and credit the Treasury for a sum equivalent to the amount expended as provided for in Section 4 of this Act, the remainder of the proceeds of said loan shall be credited on the books of the State Treasury Department, to be expended as needed by the State, upon approval by the Board of Public Works, for the purpose of aiding in the construction of a new science building on the campus of the College of Notre Dame, in Baltimore City.

SEC. 6. *And be it further enacted,* That the payment of any funds under the provisions of this Act for the purpose of aiding in the construction of a new science building on the campus of the College of Notre Dame, in Baltimore City, shall be contingent upon the provision by the College of Notre Dame of Maryland of at least an equal and matching fund from other sources, including the Federal government. The said College shall have until January 1, 1964, to present evidence satisfactory to the Board of Public Works that it has raised at least this equal and matching fund for the purpose of aiding in the construction of a new science building on the campus of the College of Notre Dame, in Baltimore City. Upon receiving from the Board of Public Works a certification of such suitable evidence on or before January 1, 1964, the Treasurer of the State is hereby authorized, empowered and directed to proceed to spend the proceeds of said loan agreeably to the other provisions of this Act. If such satisfactory evidence of the raising of at

least an equal and matching fund is not presented to the Board of Public Works on or before January 1, 1964, no funds under the provisions of this Act shall thereafter be paid over to or expended for the purpose of aiding in the construction of a new science building on the campus of the College of Notre Dame, in Baltimore City.

SEC. 7. *And be it further enacted,* That until all of the interest on and principal of any certificates issued under this Act have been paid in full, there is hereby levied and imposed an annual State tax on each $100 of assessable property at the rate to be determined in the following manner: on or before December 1, 1962, and on or before December 1 in each calendar year thereafter, the Board of Public Works shall certify to the governing bodies of each of the Counties and Baltimore City the rate of State tax on each $100 of assessable property necessary to produce revenues to meet all interest and principal which will be payable to the close of the next ensuing calendar year on all certificates theretofore issued or theretofore authorized by resolution of the Board of Public Works to be issued, and the governing bodies of each of the Counties and Baltimore City shall forthwith levy and collect such tax at such rate.

All matters committed by this Act to the discretion of the Board of Public Works shall be determined by a majority of said Board.

SEC. 8. *And be it further enacted,* That this Act shall take effect June 1, 1962.

Approved March 23, 1962.

APPENDIX B

OPINION OF THE COURT OF APPEALS OF MARYLAND

The Horace Mann League of The United States of America, Inc., et al.

v.

Board of Public Works of Maryland, et al.

No. 356 September Term, 1965 Filed June 2, 1966

Appeal from the Circuit Court for Anne Arundel County
Honorable O. Bowie Duckett, Judge

Argued before: Prescott, C.J., Hammond, Horney, Marbury, Oppenheimer, and Thomas J. Keating, Jr. (Specially assigned) and Ralph W. Powers (specially assigned), JJ.

Opinion by Prescott, C.J.

Dissenting Opinion, in part, by Hammond J. in which Horney and Marbury, JJ. concur

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PRESCOTT, C.J.

After dismissal of their bill of complaint, which challenged the validity, as violating the Federal and Maryland Constitutions, of four separate statutes, providing outright, matching grants, totaling $2,500,000, for the construction of buildings, to four private colleges, the plaintiffs appealed. The four colleges and appropriate public officials were named as defendants; injunctive relief and a declaration to the effect that the grants were unlawful were prayed.

The questions involved have been briefed and argued with signal care, skill, and ability by counsel for the respective parties.

The appellees contend that appellants lack standing to invoke the jurisdiction of the courts. The principal issue, of course, is whether any one (or more) of the statutes violates the First and Fourteenth Amendments to the Federal Constitution, or Articles XV, XXIII, or XXXVI of our Declaration of Rights. Appellants concede that some degree of relationship to church or religion may exist in an educational institution without rendering it "sectarian"; they contend, however, that when such a relationship is "substantial," it renders the institution sectarian and grants of public funds may not constitutionally be made to it. Four of the appellees state that the colleges involved "are admittedly related in varying degrees to particular religious denominations," but urge that there is no constitutional proscription against a state granting "public funds to a sectarian college, nor is there anything in either constitution which forbids grants for educational purposes to colleges which bear a substantial relation to a church." We think the orderly and efficacious sequence in which to consider these issues is first to determine the question of standing, for if the appellees prevail thereon, it will control the entire appeal; next to decide the test to be applied to the statutes in determining whether they are constitutionally permissible or impermissible under the First Amendment; then to apply that test to the facts in the record pertaining to the individual colleges; and finally to consider whether the grants violate the named sections of the Maryland Constitution.

The Standing of the Parties Plaintiff

The Chancellor held that the Horace Mann League of the United States of America, Inc., lacked standing. We agree. It is a non-profit educational and charitable Maryland corporation organized, as claimed by it, for the purpose of fostering and strengthening the American public school system.

It argues that the Chancellor "took an unduly restrictive view of the status in modern jurisprudence of organizations formed to protect the public interest * * *," ask us to compare several Federal cases in which the N.A.A.C.P. participated as a party, and to consider several law-review articles relative thereto. We have considered the same, but find nothing therein which would warrant our departing from the former rulings of this Court. The Chancellor was correct in his ruling. *Citizens Committee v. County Commissioners,* 233 Md. 398; *Bar Association v. District Title Co.,* 224 Md. 474.

The appellees challenge the standing of the individual appellants on two grounds: (a) "the miniscule dimensions of the plaintiffs' financial stake in the challenged programs * * *"; and (b) that if Maryland were required to educate the Maryland students who now attend the appellee colleges, the cost would be much greater to the State than the grants under consideration.

(a)

Most of the appellees, rightly we think, concede that the recently decided case of *Murray, Etc., v. Comptroller,* 241 Md. 383, fatally undermines their argument here. Having so recently considered and enunciated our conclusions on the question, it would be a useless gesture to elaborate further thereon. We hold that *Murray* is controlling on this point, and the individual appellants do not lack standing for the reasons there assigned.

(b)

There are a number of answers to this contention. We shall name but two. All of the parties agree that the issues here presented are of great public interest and concern. When this is the case, the necessary interest or injury to sustain standing to institute a taxpayer's suit is "broadly comprehensive" and may be "slight." In *Baltimore Retail Liquor Stores Ass'n v. Liquor License Comm'rs,* 171 Md. 426, this Court stated its opinion on the merits, even though

the plaintiffs lacked technical standing. For other cases wherein there were similar holdings or the principle recognized see *Citizens Committee v. County Comm'rs, etc., supra; Hammond v. Lancaster*, 194 Md. 462; *Dutton v. Tawes*, 225 Md. 484. We agree with the parties that the issues are of general and urgent public interest, and they are of sufficient importance and magnitude to invoke the above principle, if the factual situation rendered it necessary to do so.

However, we do not find it necessary to base our conclusion that the individual appellants have standing on the above theory, alone. In *Berghorn v. Reorganized School District No. 8*, 260 S.W. 2d 573 (Mo.), taxpayers' standing to sue to prevent expenditures of state funds for religious schools was attacked on the ground that the challenged expenditure would cost plaintiffs less than the taxes they would be required to pay if the students at such religious schools were educated in the public schools. In sustaining plaintiffs' standing and granting relief, the court stated:

> "In determining a taxpayer's pecuniary injury resulting from the unlawful expenditure of public funds, we may not weigh lawful expenditures against unlawful expenditures, because no legal injury results from the lawful expenditures of public funds."

We agree with the Missouri Court. Also compare this Court's holding in *McKeldin v. Steedman*, 203 Md. 89, wherein the same principle was applied, although no religious issue was there involved, and *Abington School Dist. v. Schempp*, 374 U.S. 203, n. 9.

Further on the question of standing, appellees argue that if the suit had been instituted in a Federal court, appellants would have lacked standing to attack the grants as being impermissible under the United States Constitution; hence the Maryland courts should not permit them to challenge state statutes as being violative of the Federal Constitution in the state courts. Again, the *Murray* case, *supra*, supplies the quick answer, wherein Judge Oppenheimer, for the Court, said:

> "When the validity of a state statute is attacked in a state court, it is the duty of that court to determine all the constitutional issues involved, federal as well as state. If the statute is held valid under the state law, but invalid under the federal Constitution, the state court must give the complainants the relief they pray. * * *. If they have standing under the law of Maryland to bring the suit, it is irrelevant that the result might have been different had the action been instituted in a federal court." 241 Md. p. 392.

We hold that the Chancellor was correct in ruling that the individual appellants had standing.

The Test To Be Applied

It should be noted at the outset that nothing in this opinion is intended as a criticism of, or a boost to, any religion, sect, or schism, or lack of religion. Our task is to decide a constitutional issue. We proceed to do just that, and that alone.

For our present purposes, it will be unnecessary to include an extended historical background of the First Amendment[1] (which, of course, is likewise pertinent, in large measure, to Article XXXVI of our Declaration of Rights). However, it seems appropriate to set forth a sketchy outline of some of the facts which the Framers of our Federal Constitution and the First Amendment thereto had in mind when the Amendment was added. In about 112 A.D., Pliny wrote to the Roman Emperor Trajan to inquire whether he was dealing out exact justice to Christians who had done nothing in violation of the law. He stated that he asked thrice if the person charged (man,

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[1] Those interested in pursuing this aspect of the case further will find interesting, instructive, and rather comprehensive treatments of the subject in Justice Black's opinion in Everson v. Board of Education, 330 U.S. 1, in Justice Frankfurter's opinion in McCollum v. Board of Education, 333 U.S. 203, in Justice Clark's opinion in Abington School Dist. v. Schempp, supra, Justice Rutledge's dissent in Everson, supra, and in 2 Cooley's Constitutional Limitations, pp. 960-985.

woman, or child) were a Christian. If the person answered in the affirmative 3 times, he or she was executed. Trajan answered, "My Pliny — you have taken the method which you ought * * *."[2] The persecution of the Christians by the heathens continued (by throwing them to the lions, etc., as every school child is taught) until about A.D. 313, when Emperor Constantine embraced their belief; and later in the 4th century Christianity became the official religion of Rome.

After Christianity became the established Church of Rome and the Church gradually increased in wealth and power, there constantly developed disputes in the various provinces between the Roman bishops and the civil authorities as to their respective authority. In time, the Church became so rich and influential that certain of the Popes felt free to assert their authority as being superior to that of the reigning Sovereigns. This, naturally, developed angry and deep-rooted conflicts and controversies between the Papacy and some of the nations, and also between nations, themselves, depending upon whether or not they agreed with the Papacy.

The religious Crusades (about 1096 to 1270) are also subjects which are still taught to nearly every school child. They engaged, off and on for some 200 years, practically all of the continental European nations and England in costly and cruel warfare in attempts to capture and to hold the Holy Land. In these conflicts, not only reigning monarchs and nobility participated in actual combat but also Church bishops and clerics. A fact concerning the Crusades, not so generally known as the above, is that two of them were armies of about 30,000 and 20,000, respectively, composed of small boys and girls, many of whom, quite naturally, died.[3]

We pass over a short period of time, in which the unbridled fervor and fanaticism of the Church grew and ex-

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[2] 1 The Genuine Works of Flavius Josephus (dissertation), pp. 63-65.

[3] 3 World Book Ency., p. 928.

panded, to the origin of the Spanish Modern Inquisition (about 1481). Frequently this fervor vied with secular authority and caused most important incidents such as the murder of Saint Thomas A. Becket, the Roman Catholic Archbishop of Canterbury, while at vespers, in 1170 A.D.[4] Because of his opposition to royal authority, Henry II is reputed to have said in the presence of his knights: "Have I not about me one man of enough spirit to rid me of a single insolent prelate?" Four knights immediately accepted the "commission," and carried out the king's expressed desire. Another important event occurred shortly thereafter (about 1208). Pope Innocent III commanded a delegation of the monks at Canterbury to select Stephen Langdon archbishop in place of a person whom King John had compelled them to elect. The King refused to permit Langdon to land in England. After trying other measures, the Pope "deposed" John and ordered King Philip of France to seize the English Crown. In the end John was forced to accept Langdon, and in addition to promise to pay a tax of some $64,000 (in current money) a year for permission to keep his crown.

We need not dwell long on the horrors and perfidies of the Inquisition, but to understand the intensity of feelings motivating the persecutions of this era, it is necessary to know the teachings of the Church at that time and what the law of the civil authorities authorized. We quote a few excerpts from authorities relative thereto:

> "Acts of intolerance are to be discerned from the earliest period in which Christianity became the established religion of the Roman Empire. But they do not seem to have flowed from any systematized plan of persecution, until the papal authority had swollen to a considerable height."
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> * * * * * *
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> "In the present liberal state of knowledge [about 1837], we look with disgust at the pretensions of any

[4] 3 The World Book Ency.; p. 150. A pilgrimage from London to Canterbury, where the Saint was buried, is, of course, the theme of Chaucer's famous "Canterbury Tales."

human being, however exalted, to invade the sacred rights of conscience, inalienably possessed by every man."[5]

"But, to judge the action fairly, we must transport ourselves to the age when it happened. The difficulty that meets us in the outset is, to find a justification of the right of conquest, at all. But it should be remembered, that religious infidelity, at this period, and till a much later, was regarded — no matter whether founded on ignorance or education, whether hereditary or acquired, heretical or Pagan — as a sin to be punished with fire and faggot in this world, and eternal suffering in the next. This doctrine, monstrous as it is, was the creed of the Romish, in other words, of the Christian Church, — the basis of the Inquisition, and of those other species of religious persecutions, which have stained the annals, at some time or other, of nearly every nation in Christendom. Under this code, the territory of the heathen, wherever found, was regarded as a sort of religious waif, which, in default of a legal proprietor, was claimed and taken possession of by the Holy See, and as such was freely given away by the head of the Church, to any temporal potentate whom he pleased, that would assume the burden of conquest. Thus, Alexander the Sixth generously granted a large portion of the Western hemisphere to the Spaniards, and of the Eastern to the Portugese. These lofty pretensions of the successors of the humble fisherman of Galilee, far from being nominal, were acknowledged and appealed to as conclusive in controversies between nations."[6]

We move to a later date (around 1500) and see the conflicts and controversies between Church and State continuing.

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[5] 1 Prescott's Ferdinand and Isabella, pp. 230, 231.

[6] II Prescott's Conquest of Mexico, pp. 30, 31. Lea, A History of the Inquisition in the Middle Ages.

"We shall conclude this Chapter by a melancholy truth which obtrudes itself on the reluctant mind; that even admitting * * * all that history has recorded * * * on the subject of martyrdoms, it must still be acknowledged that the Christians in the course of their intestine dissentions, have inflicted far greater severities on each other than they had experienced from the zeal of the infidels. * * *. In the Netherlands alone more than 100,000 of the subjects of Charles V are said to have suffered by the hand of the executioner."[7]

The protracted controversies between Henry VIII and the Papacy, with attendant executions, were, and are, well known. They resulted in a series of enactments of Parliament which severed the great financial, legal, and administrative ties which had joined the English state with Western Christendom, and the English Church with the Holy See. The Act of Supremacy declared Henry the head of the Church of England and the inheritor of the jurisdiction of the Bishop of Rome. After the knowledge of several "judicial murders" in England reached Rome, the Pope issued a bull which excommunicated Henry, delivered his soul to Satan, and his kingdom to the first invader. The King replied by sequestering and, after pillaging, destroying a large number of religious houses[8] (reputed as 645 monasteries, 2374 chapels, 90 collegiate churches and 110 charitable institutions).

Six years after the death of Henry, his daughter Mary ascended the throne. She was a devout Roman Catholic, and did everything she could to re-establish that Church in England. She resumed old relations with the Pope, and to accomplish her objectives in supporting her religion, she resorted to the arguments of the dungeon, the rack and the fagot, and, when her bishops slackened their work of persecution and execution, she urged them not to stay their hands.[9] The penalty for reading the English Scriptures or

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[7] II Gibbon, The Decline and Fall of the Roman Empire (Smeaton ed.), pp. 197, 198.

[8] Montgomery, The Leading Facts of English History, pp. 197, 198.

[9] Montgomery, op. cit., p. 209.

offering Protestant prayers was death.[10] Montgomery, *op. cit.* in footnote 8, at p. 209, says that Mary's state of mind was the same as all who then held strong convictions, and "each party believed it a duty to convert or exterminate the other, and the alternative offered to the heretic was to 'turn or burn'."

Elizabeth I (1558-1603) succeeded her sister Mary on the throne, and we are now approaching the period when the first permanent English colonies were to be established on this continent. Her ascension was followed by the repeal of many of the religious laws enacted in Mary's reign, the enactment of a new Act of Supremacy, and an adoption of a revised version of the religious beliefs of the English Church, formulated under Edward VI (1547-1553). Commenting on these and other enactments, Montgomery, *op. cit.* at p. 214, states: "The reason for these stringent measures was in that age Church and State were everywhere considered to be inseparable. No country in Europe — not even in Protestant Germany — could then conceive the idea of their existing independently of each other. Whoever refused to support the established form of worship, *whatever that might be,* was looked upon as a 'rebel' against the government." (Emphasis added.)

The number of Puritans, Protestants who did not believe that the tenets of the Established Church of England went far enough in "purifying" that Church from Roman influences, grew by leaps and bounds in the last half of Elizabeth's reign. Before James I was crowned (1603), they presented a great Petition to him requesting certain rights and privileges. The requests were denied and James avowed he would make all conform to the Established Church or leave the country. In despair but with firm determination, a band of these Puritans, not being able to obtain a royal license to go to America, emigrated (about 1608) to Holland where they remained for 12 years. Finally James granted them permission to go to America, so in

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[10] Benjamin Franklin, one of the Framers, gives an interesting account in his autobiography of how one of his ancestors circumvented this proscription.

1620 (just 2 years after the beginning of the devastating religious war in Europe called the Thirty Years' War, and 29 years before the Puritans murdered King Charles I) our Pilgrim Fathers set sail for this country, being the first Englishmen to flee from religious persecution, seeking an asylum in this country where they could worship according to the dictates of their consciences.

We shall narrate, briefly, two other events that occurred in Europe, and do so because of their importance to, and influence over, the colonies of this country as they developed. We mentioned above the Thirty Years' War (1618-1648); it began as a civil war between the Protestants and the Roman Catholics in the German States, but before it was over nearly all of the nations of Europe became involved. One authority gives the following account of the results thereof:

> "Germany was in a pitiable condition by the time the war finally ended. *More than half the people had been killed.* Those who survived saw nothing but ruin wherever they loked. Whole cities, villages, and farms had disappeared, *and two thirds of all the property had been destroyed.* Art, science, trade, and industry languished. It took about two hundred years for Germany to recover from the effects of [this war]. *Thousands of persons left Europe, especially Germany, and went to America to build a new life.*"[11] (Emphasis added.)

Finally, we mention the fate of the Huguenots in France. They were French Protestants, who grew into sizable proportions in the 1500's and 1600's. A civil war broke out between them and the Roman Catholics. Without going into the sad details of that unfortunate conflict, the Huguenots, after much bloodshed and many deaths, were given freedom of worship in about 75 towns and cities by the

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[11] 17 The World Book Ency., p. 200; see also 2 World's Best Histories, Germany, Part XVIII; 22 Encyclopedia Brittanica, pp. 136 et seq.

Edict of Nantes (1598), but they again lost the same in 1685, when Louis XIV repealed the Edict. Again we find:

> "Thousands of Huguenots fled France to new homes in England, Germany, Holland, and America. *Many settled and prospered in South Carolina, Virginia, Massachusetts, and New York* [emphasis ours]. Among such Huguenots were the Legare, Petigru, Maury, Revere, Jay, and DeLancey families."[12]

We shall not discuss in detail the complexities that arose concerning Church and State in each of the Colonies. It seems obvious that our revered Pilgrim Fathers, who had come here to seek religious freedom, were not in a mood to grant complete religious freedom of thought to all others. We all know of the banishment of Roger Williams. It also is apparent that Maryland's vaunted Toleration Act of 1649 granted religious tolerance only to Christians, and it is entirely possible that it was prompted, at least in part, by expediency. The Puritans had taken over the government in the Mother Country in the early part of that year, and the Lord Proprietor, in order to strengthen his position with the Home Government had issued invitations to settle here to the New England Puritans and those of Virginia, where Governor Berkeley, in spite of the Puritan successes in England, remained a Royalist and an adherent of the Anglican Church. Andrews, *The Founding of Maryland*, Ch. XII. We close our remarks concerning the colonies with the observation that at least 8 of them had Established Churches before the Revolution; and Virginia, after a struggle lasting about 7 years had defeated a Bill which would have permitted taxation to support religions and

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[12] 8 World Book Ency., p. 375. For a rather detailed account of the trials and tribulations of the Huguenots, and the extreme provisions of the Resolution revoking the Edict of Nantes — demolition of all chapels, interdiction of any assembly or worship, all ministers to leave the kingdom within 15 days, all schools closed, new-born babies to be baptized by the parish priests, Huguenots forbidden to leave the kingdom on pain of galleys for the men, and confiscation of person and property for the women, etc. — see IV The World's Best Histories, France, Ch. XLVII.

had enacted Jefferson's Bill for Establishing Religious Freedom, in 1786. (For an instructive and more comprehensive treatment of the situation in the Colonies, see Justice Black's opinion in *Engel v. Vitale*, 370 U.S. 421.)

Thus it is seen that the Framers knew man's difficult-to-suppress (and still unextinct) desire to persuade, and failing in persuasion, to compel others to adopt and believe his religious views, and man's unswerving determination to select the religious views most appealing to him individually and his quest to believe those views and to worship without fear or favor had been potently divisive forces ever since the deeds of mankind had been recorded. So great had been the impact of the latter determinants that neither dungeons, mortally bleak winters in far-distant colonies, plain executions, wholesale burnings at the stake, nor the prolonged and "exquisite" agonies produced by the tortures of machinations developed by the most ingenious minds of the ages (i.e. "persecution inperfection") had dissuaded man in his pursuit of religious freedom and religious equality.

Even though the above is but a sketchy outline of the subject involved (as we stated above), we have set the same forth at some length to demonstrate that the problem to be considered and solved when the First Amendment was proposed was not one of hazy or comparative insignificance, but was one of blunt and stark reality, which had perplexed and plagued the nations of Western Civilization for some 14 centuries, and during that long period, the union of Church and State in the government of man had produced neither peace on earth, nor good will to man.

In an attempt to prevent recurrences of many of the unfortunate evils mentioned above (and those mentioned in the opinions named in footnote 1) our forebears decided it was best for Government, best for Religion and best for mankind that the two be kept separate and apart. In order to effectuate this goal, the First Amendment was adopted which provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free

exercise thereof * * *."[13] A narrow and literal reading of the same might cast some doubt as to whether our present factual situation presents any question relative to an "establishment" of religion, but we shall point out below that the Supreme Court has not construed the Amendment in such a narrow fashion as to exclude the issues here raised from its purview. See, for example, *McCollum v. Board of Education, supra,* 333 U.S. at p. 213.

Before considering the Supreme Court decisions, we shall dispose of two subordinate arguments advanced by the appellees. Under the heading of Legislative Practice, they set forth large and imposing grounds made by Congress to various institutions and programs sponsored by governmental agencies and departments. The actions of the Legislative Branch are, of course, entitled to consideration and respect, *Murray, Etc. v. Comptroller, supra,* 241 Md. at p. 400; but they are not controlling in the determination of a direct and specific constitutional attack on an individual statute. *Schempp, McCollum,* and *Engel,* all *supra,* and *Torcaso v. Watkins,* 367 U.S. 488, wherein the Supreme Court uprooted long-standing and established practices sanctioned by legislative and state constitutional provisions.

They also argue that if the grants herein be invalidated, that no state grant to any educational institution could be sustained, unless every vestige of officially sponsored religious observances be entirely divorced from the institution. The appellants label this "appellees all-or nothing argument." The argument loses sight, we think, of the fact that there is a constitutional difference between a sectarian institution and a secular one, which may officially sponsor one or more religious observances. We shall point out the test to be applied below.

This brings us to a consideration of the Supreme Court decisions bearing on the questions here involved. The parties on both sides of the controversy have carefully an-

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[13] At this late date, it requires no citation of authority to assert that the same proscription applies to the states through the Fourteenth Amendment.

alyzed the same in their briefs. Justice Clark did likewise in his opinion in *Schempp, supra,* as to the decisions preceding it. However, we do not deem it necessary or desirable to take up each of these decisions and analyze them in detail, for this Court has very recently stated their rationale in *Murray, Etc., supra* (241 Md. at pp. 398 and 401, involving church exemptions from taxation), where Judge Oppenheimer, for the Court without dissent, said:

> "In our reading of the opinions, however, we find broad guide lines which form the frame within which the case before us is to be considered. We are a religious people and recognize the effect religious institutions have on human activity. The First Amendment was designed to erect 'a wall of separation between church and State.' Mutual independence, under our Constitution, is deemed best for the State and best for religion. *The State cannot forbid, nor can it perform or aid in performing the religious function. Like other broad constitutional concepts, the meaning of 'separation' is to be ascertained in the application of the principle to specific cases.* A state cannot pass a law to aid one religion or all religions, but state action to promote the general welfare of society, apart from any religious considerations, is valid, even though religious interests may be indirectly benefited. If the primary purpose of the state action is to promote religion, that action is in violation of the Amendment, *but if a statute furthers both secular and religious ends, an examination of the means used is necessary to determine whether the state could reasonably have attained the secular end by means which do not further the promotion of religion.*" (Emphasis added.)
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> "As *McGowan* makes clear, even though the exemption had an unmistakenly religious origin, if the present purpose and effect of the exemption is primarily secular, *and if those secular* purposes could not reasonably be deemed achievable without an inci-

dental benefit to religious organizations, the 'establishment' clause is not violated."[14]

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[14] The above rationale is supported and emphasized by so many statements in the Supreme Court's decisions that one is at a loss to know where to start and where to end in naming them. We set forth a few. "These words of the First Amendment reflected in the minds of early Americans a vivid mental picture of conditions and practices which they fervently wished to stamp out * * *." "These practices [the collection of taxes and tithes to sustain government-sponsored churches] became so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence. * * *. The people there [in Virginia], as elsewhere, reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions * * *." After quoting from the celebrated "Virginia Bill for Religious Liberty," 12 Heming, Statutes of Virginia (1823) 84, originally drafted by Jefferson, stating that "Almighty God hath created the mind free; that all attempts to influence it by temporal * * * burthens * * * tend only to beget habits of hypocrisy and meanness * * *," and "that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical * * *," the Supreme Court "* * * recognized that the provisions of the First Amendment * * * had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute." * * *. "New Jersey cannot consistently with the 'establishment of religion' clause * * * contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church." All from the majority opinion in Everson, supra.

"With Jefferson, Madison believed that to tolerate any fragment of establishment would be by so much to perpetuate restraint upon that freedom [general freedom]. Hence he sought to tear out the institution not partially but root and branch, and to bar its return forever."

"In no phase was he [Madison] more unrelentingly absolute than in opposing state support or aid by taxation. Not even 'three pence' contribution was thus to be exacted from any citizen for such a purpose." Memorial and Remonstrance against Religious Assessment. [The Memorial is set forth in Appendix, 330 U.S. pp. 63 et seq.] * * *. "Their objection was not to small tithes. It was to any tithes whatsoever. * * *. Not the amount but the 'principle of assessment was wrong.'" * * *. "In view of this history no further proof is needed that the Amendment forbids any appropriation, large or small, from public funds to aid or support any and all religious exercises." A few excerpts from Justice Rutledge, with whom Jus-

There are two celebrated passages in the opinions of the Supreme Court relating to the provisions concerning religion in the First Amendment: the first is in *Everson;* the other is in *Schempp.* Justice Black, for the Court, in *Everson,* said:

"The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor

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tices Frankfurter, Jackson, and Burton concurred in Everson, supra, dissenting.

In McCollum, supra, interested members of the Jewish, Roman Catholic, and some of the Protestant faiths formed a voluntary association. They obtained permission from a Board of Education to offer classes in religious instruction in the public schools. "The foregoing facts * * * show the use of tax-supported property for religious instruction * * *. The operation of the State's compulsory education system thus assists and is integrated with the program of religious instruction * * *. This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First Amendment * * *." "The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the State's compulsory public school machinery. This is not separation of Church and State." From the Court's opinion in McCollum, supra.

Justice Frankfurter, with whom Justices Jackson, Rutledge and Burton agreed in his concurring opinion in McCollum, supra, said:

"Illinois has here authorized the commingling of sectarian with secular instruction in the public schools. The Constitution of the United States forbids this."

* * * * * *

"Separation means separation, not something less. Jefferson's metaphor in describing the relation between Church and State speaks of a 'wall of separation,' not of a fine line easily overstepped."

In Engel, supra, it was stated:

"They knew the anguish, hardship and bitter strife that could come when zealous religious groups struggled with one another to obtain the Government's stamp of approval from each King, Queen, or Protector that came to temporary power."

"When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."

Among many other cogent statements in Schempp, we find the following:

"There is no answer to the proposition * * * that the effect of the religious freedom Amendment to our Constitution was to take

> the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance.

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every form of propagation of religion out of the realm of things which could directly or indirectly be made public business and thereby be supported in whole or in part at taxpayers' expense * * *."

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"It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion."

* * * * * *

"The wholesome 'neutrality' of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies."

* * * * * *

"Applying the Establishment Clause principles to the cases at bar we find that the States are requiring the selection and reading at the opening of the school day of verses from the Holy Bible and the recitation of the Lord's Prayer by the students in unison. These exercises are prescribed as part of the curricular activities of students who are required by law to attend school. They are held in the school buildings under the supervision and with the participation of teachers employed in those schools. None of these factors, other than compulsory school attendance, was present in the program upheld in Zorach v. Clauson. The trial court in No. 142 has found that such an opening exercise is a religious ceremony and was intended by the State to be so. We agree with the trial court's finding as to the religious character of the exercises. Given that finding, the exercises and the law requiring them are in violation of the Establishment Clause."

"The conclusion follows that in both cases the laws require religious exercises and such exercises are being conducted in direct violation of the rights of the appellees and petitioners."

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"Further, it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too

> No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.' *Reynolds v. United States, supra* at 164."

Justice Clark wrote the opinion in *Schempp*. In part, it stated:

> "The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. *Everson v. Board of Education, supra.*"

The first quotation was repeated in *McCollum, supra,* and portions thereof were likewise repeated in *McGowan*

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soon become a raging torrent and, in the words of Madison, 'it is proper to take alarm at the first experiment on our liberties.' "

Justice Douglas stated in his concurring opinion:

"*The most effective way to establish any institution is to finance it; and this truth is reflected in the appeals by church groups for public funds to finance their religious schools.* Financing a church either in its strictly religious activities or in its other activities is equally unconstitutional, as I understand the Establishment Clause. Budgets for one activity may be technically separable from budgets for others. But the institution is an inseparable whole, a living organism, which is strengthened in proselytizing when it is strengthened in any department by contributions from other than its own members." (Emphasis in the original.)

Probably much of this language would have been included in the majority opinion, had a direct grant, or direct expenditure, of money been involved.

v. Maryland, 366 U.S. 420, and *Torcaso v. Watkins*, 367 U.S. 488. In *Zorach v. Clauson*, 343 U.S. 306, the Court upheld the constitutionality of a "released time" for religious instruction program (there being no expenditures of public funds or use of public buildings), stating, however, "government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education * * *." And in *Engel, supra*, as stated in footnote 14, the Court said when "the power, prestige and financial support of government is placed behind a particular religious belief," the Establishment Clause is violated.

The Chancellor read the *Schempp* opinion as setting forth a new and comprehensive test to apprehend what was constitutionally permissible and impermissible under the Establishment Clause. We do not read the opinion in that manner. We do not read it as establishing a completely new test, nor one that can be applied in all cases as a final and determinative one. *Schempp* did not involve a direct expenditure nor a direct grant of money.[15] We read the test therein mentioned as being sufficient to decide the issues there involved, and, as the factual situation showed that the statutes could not even pass the test named, no more was needed to be said or added thereto. In other words, the statutes there involved clearly showed that their "purpose and primary effect" was the advancement of religious exercises. If either their "purpose" or "primary effect" were such advancement, the statutes were unconstitutional, and, as they offended in both aspects, that determined the issue; so why add hypothetical tests attempting to cover all conceptual factual situations, such as where secular and sectarian exercises are fused or commingled, etc.?

It is inconceivable to us that *Schempp* was intended *sub silentio* to overrule or supersede *Everson* and the other Establishment cases preceding *Schempp*. On the contrary, *Everson* is cited in the opinion, with approval, some half

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[15] Justice Douglas was the only member of the Court who felt that even though the public expenditure was minuscule, it was sufficient to invalidate the statutes involved.

dozen times. (In fact, *Everson*, is cited as the authority for naming the test.) At one point, after quoting, with approval, from *Everson*, from Justice Jackson's dissent therein to the effect that the First Amendment "was to take every form of propagation of religion out of the realm of things which could directly or indirectly be made public business and thereby be supported in whole or in part at taxpayer's expense * * *"; from Justice Rutledge's dissent therein which declared, "but the object was broader than separating church and state in this narrow sense. [i]t was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion"; the Court went on to say (in *Schempp*) "the same conclusion has been firmly maintained ever since that time [citing *McCollum*, *McGowan* and *Torcaso*, all *supra*]." (Emphasis added.)

After a consideration of all of the Supreme Court decisions and our statement of their rationale, quoted above, we have reached the conclusion that, insofar as the issue of the First Amendment is concerned, we should apply the following standards in measuring the statutes under consideration.

As it is claimed that First Amendment liberties have been infringed upon, we must closely scrutinize and carefully consider the issues presented. *McGowan, supra*, 366 U.S. at p. 449. Each case must be determined on its particular facts. *Murray, Etc., supra*, 341 Md. at p. 398. We must examine each of the statutes and decide whether it can be demonstrated that its purpose — as evidenced either on its face, in conjunction with its legislative history, or in its operative effect — is to use the State's coercive power to aid religion. *Schempp, supra*, 374 U.S. 203, and Justice Frankfurter's opinion in *McGowan*, 366 U.S. at pp. 466, 467. "If the primary purpose [as contradistinguished from an incidental one] of the state action is to promote religion, that action is in violation of the Amendment, but if [the operative effect of] a statute furthers both secular and religious ends, an examination of the means

used is necessary to determine whether the state could reasonably have attained the secular end by means which do not further the promotion of religion." *Murray Etc., supra.* Cf. *McGowan, supra.* No tax, in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called or whatever form they may adopt to teach or practice religions. *Everson, supra,* 330 U.S., at p. 16. Although a state cannot "contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church," it cannot exclude individuals, because of their faith or lack of it, from receiving the benefits of valid public welfare legislation. *Everson, supra,* (a case wherein the Court stated the factual situation "verged" upon the impermissible). When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. *Engel, supra,* 370 U.S., at p. 431. We are unable to accept appellees' contention that every religious observance by an institution sectarianizes the same, but feel that the question of sectarianization depends upon a consideration of the observances, themselves, and the mode, zeal, and frequency with which they are made. These principles are sufficient. we think, to determine our present issues, and we shall apply them in considering the four statutes involved.

We have comparatively little difficulty with such cases as *Bradfield v. Roberts,* 175 U.S. 291, *Quick Bear v. Leupp,* 210 U.S. 50, and *Cochran v. Louisiana, etc.,* 281 U.S. 370, all cited by the appellees. We shall make but a short analysis of the same. Justice Brennan, in his concurrence in *Schempp, supra,* said: "A scrutiny of several earlier cases [including the three cases named above] * * * shows that such cases neither raised nor decided any constitutional issues under the First Amendment." We agree.

And we find no great difficulty in distinguishing *McGowan v. Maryland, supra,* wherein the validity of the Maryland Sunday-closing laws were upheld. There, gen-

eral "public welfare legislation" was upheld because its then "present purpose and effect" was "to provide a uniform day of rest for all citizens," even though religion might have been affected or benefited in a purely incidental manner. It was much the same holding, in principle, as *Everson, supra*, wherein the Court observed that the legislation "verged" upon being impermissible. As we have stated above, it is a question of degree as to how far all religions or a specific religion may be benefited by State action without the State stepping out of its role of complete "neutrality," and such action losing its character as being incidental to lawful general welfare legislation.

APPLYING THE STANDARDS TO THE INDIVIDUAL COLLEGES

There is little controversy over the facts in any of the cases; rather the dispute is as to the legal effect of the facts.

The experts on both sides are in general accord that the following factors are significant in determining whether an educational institution is religious or sectarian: (1) the stated purposes of the college; (2) the college personnel, which includes the governing board, the administrative officers, the faculty, and the student body (with considerable stress being laid on the substantiality of religious control over the governing board as a criterion of whether a college is sectarian); (3) the college's relationship with religious organizations and groups, which relationship includes the extent of ownership, financial assistance, the college's memberships and affiliations, religious purposes, and miscellaneous aspects of the college's relationship with its sponsoring church; (4) the place of religion in the college's program, which includes the extent of religious manifestation in the physical surroundings, the character and extent of religious observance sponsored or encouraged by the college, the required participation for any or all students, the extent to which the college sponsors or encourages religious activity of sects different from that of the college's own church and the place of religion in the curriculum and in extra-curricular programs; (5) the re-

sult or "outcome" of the college program, such as accreditation and the nature and character of the activities of the alumni; and (6) the work and image of the college in the community.

With these criteria and the standards we named above in mind, we consider the schools, individually. In setting forth the facts relevant to each, we have followed, in considerable measure, appellants' brief with reference to some of the schools, after carefully checking the same with the evidence.

Hood College

Chapter 88 of the Acts of the General Assembly of 1962 grants to Hood College $500,000 to help erect a dormitory and a classroom building.

According to the College Bulletin issued in 1963, Hood is "an independent liberal arts college for women," and it "is church related through its affiliation with the United Church of Christ [U.C.C.], but welcomes students of all religious faiths." It is listed in a Tabulation of the Danforth Foundation of Institutions Associated with Religious Bodies as "reflecting religious orientation." It is a small college, limited to an enrollment of about 650 students, and is governed by a Board of Trustees consisting of 35 members. Seven of these are elected by agencies of the U.C.C.; 22 by the Board itself; and 6 by the Alumnae Association from its membership. The President is selected by the Board, and the President, after screening by appropriate college officials, selects the administrative personnel. Faculty members are usually located by the chairman of the department where a vacancy occurs. They are selected upon an analysis of their academic credentials, qualifications, and earned degrees, and their "character and congeniality." There are no sectarian requirements for members of the faculty; the President thought that Hood had "virtually all shades of religious affiliations represented [thereon] and non-religious affiliation." In the year 1963-1964, there were 7 Episcopalians, 2 of the Jewish faith, 3 Lutherans, 6 Methodists, 1 with no affiliation indi-

cated, 13 Presbyterians, 2 listed as Protestant but non-denominational, 5 Roman Catholics, 3 members of the Society of Friends, 3 Unitarians, and 10 members of the U.C.C., a rather heterogeneous faculty for a sectarian school.

There is no requirement that any member of the officers of administration be of any particular religious denomination, and, in fact, the officers of administration do not represent any particular church or religious body. Included among these are Baptists, Lutherans, Methodists, Presbyterians, one Roman Catholic and one Unitarian, and 7 members of the U.C.C.

There is no requirement that the Chaplain, who supervises, generally, the religious lives of the student body be of any particular denomination, although the present one is a member of the U.C.C.

The student body is primarily selected according to educational records supplied by the students and by the schools from whence they come; there is absolutely no requirement based on race, creed, color, or sectarian affiliation in the student body. An examination of their religious affiliation for the year 1963-64 shows such a diversification that it would unduly prolong this opinion to include them all. Among a student body of some 675 students, were included 146 Episcopalians, 29 Jewish students, 83 Methodists, 72 Roman Catholics, 108 Presbyterians, and 89 members of the U.C.C.

The college confers only two earned degrees; the A.B. degree, which is, of course, a liberal arts degree; and the B.S. degree in Home Economics. It has a department of religion and philosophy; the courses taught therein are conducted in the same manner as the courses in other departments. These courses are not geared to aiding the Protestant religions or any other; they are primarily historical studies in religion and "there is absolutely no attempt at indoctrination in any way." The President was emphatic in stating that he believed proselytizing had no place in higher education. The professors in the religious field are not confined to members of the U.C.C. or to

Protestants. In addition, there is no attempt by the U.C.C., or any other group, to select texts or to offer suggestions as to which texts should be used, and there are no courses in religion or philosophy, or anywhere else in the curriculum, which are designed to train for the ministry or religious work. The requirements for attendance at chapel (indeed, if they may be termed requirements from the evidence) do not call for frequent services, with the student being allowed generous "cuts" without excuse. On the Wednesday evening services, of which there are approximately 15 per semester, clergymen of various denominations come in and talk to the students. These include Protestants, Roman Catholics, Jewish Rabbis, and a Humanist (the President of Hood, after listening to him, being unable to state what his religious preference was). This same general pattern is followed for the Sunday evening services, but not to the same extent as the services on Wednesday evenings. The students are encouraged to maintain ties with the churches of their own denomination while at the college, and each Sunday morning they are released for the purpose of going to such churches in the locality.

In the year mentioned above, the U.C.C. contributed 2.2% of the college's total operating budget; but contributed nothing in the way of capital gifts, with the exception of one gift in the amount of $10,000 for endowed scholarships.

The college has a "very loose relationship" with the Council for Higher Education of the U.C.C., all of the church-related colleges related to the U.C.C. automatically becoming members of the Council.

During the summers the college permits various civic and religious groups to utilize their campus for programs for which modest charges are made. The school has no control over the programs, and, as far as the record discloses, the programs are not confined to church affairs or to any particular denominations.

The facilities to be housed by the grant herein involved will be a new academic building and a dormitory; no religious activities will be conducted therein.

The above summarization, we think, discloses that Hood, although it is a church-related school, may constitutionally receive the money mentioned in the Bill. No challenge under this heading is made against the Bill's permissibility other than its alleged violation of the Establishment Clause of the First Amendment.

Applying the criteria we named above, we are unable to say that the College is sectarian in a legal sense under the First Amendment, or to a degree that renders the grant invalid thereunder. The College's stated purposes in relation to religion are not of a fervent, intense, or passionate nature, but seem to be based largely upon its historical background. The College was established in 1893, when a great number of private schools were church-oriented, and it was then related to the Reformed Church of the United States. After two church mergers, one in 1933 and one in about 1962, the present sponsoring church is the newly created U.C.C. The Church does not have control over the governing body and certainly the college personnel shows no serious attempt to proselytize, or to require certain religious beliefs to become a member thereof. The financial assistance of 2.2% of the operating budget given by the Church is a moderate percentage. The only physical structure of a religious character seems to be the Chapel, and it is open to all. Religion in the curriculum and in extra-curricular programs is at a minimum for any church-related school. We do not find that religion occupies a dominant place in the College's program, the record clearly showing that students are not required to attend and participate in many religious observances. It is, of course, accredited. The record does not disclose any great activity among the alumnae of a religious nature, and, although the image of Hood in the community is that of a good, sound, and efficient College, there is no showing that it is considered to be religiously slanted. Under the above circumstances, it is obvious that neither the U.C.C. nor any other religion is running the institution, or has control over it.

We hold, therefore, that the primary purpose of the grant here involved was not to aid or support religion;

that there is nothing on the face of the Bill or its legislative history to demonstrate that its purpose was to use the State's coercive power to aid religion; and that its operative effect is not to aid religion (as we read the record, we see no aid to religion here; if there be any it assuredly is incidental and very remote in nature), but to promote the educational facilities for women. Consequently, the Bill does not violate the First Amendment.

Western Maryland

Chapter 546 of the Acts of the General Assembly of 1963 grants $500,000 to Western Maryland College for the purpose of aiding in the construction of a science wing and dining hall.

The stated purposes include religious objectives to a considerable extent. The college characterizes itself as a "religiously oriented institution" and "make[s] no bones about the fact that our philosophy at Western Maryland is a Christian philosophy."

One more than one-third of the members of the governing board are required by its Charter to be Methodist Ministers, so as to give the clergy the veto power over any change inimical to the interests of the church. The required percentage "binds the college very closely to the Church." The board is heavily Methodist, and nearly all Protestant, although quite a number of denominations are represented thereon. All the presidents have been Methodist Ministers. The administration is almost entirely Protestant, although, again, quite a number of denominations are represented.

Care is taken to obtain a faculty committed to the Christian philosophy of life, and an atheist would not be employed. Almost half of the faculty is Methodist, and almost all Protestant. Approximately 40% of the student body is Methodist, and almost all Protestant. The large number of Methodists is due to greater likelihood of acceptance of Methodist "borderline cases * * * because they

seem part of the constitutency of the college," and to the large number of Methodist students who become familiar with the college during church conferences on the campus. The college has a significant number of Methodist preministerial students. Some of these are given scholarships ranging from ½ to full tuition. And the children of Methodist Ministers are charged only half tuition.

The church provides "financial support of considerable value," both operational and capital, the operational contribution being between 2 and 3% of the budget. The college is affiliated with, and supports, denominational educational associations.

The college campus is very heavily used by Protestant religious groups (some at actual cost), and "logically and naturally, there have been of course more of the Methodist program here than any of the other denominations."

The college fosters a religious program, under the direction of a Methodist Minister. Participation in Protestant religious services is required of all students. The requirement is publicized so that if anyone has conscientious scruples about attending such services "he should know that before he comes."

The college makes a conscious effort to integrate religion, and specifically Christianity, with the curriculum and extracurricular life. Because Methodism does not have the wide range of dogma that one, or more, religions have, there is less specific religious restriction in regard to curriculum, but the school endeavors to provide a religious motivation.

We quote briefly from material contained in documents issued by the College: "Many [of the students] become seriously interested in religion for the first time [while attending the college]."

Under the heading "What Has the College Done For The Church," after listing what we have named above, we find the following:

> "The principal contribution the College is making to the Church is in accordance with its [the college's] basic purpose: to provide the best in higher education *within the framework and atmosphere of the verities and values of our Christian faith.*" (Emphasis added.)

The college is accredited by the Middle States Association of Schools and Colleges and the University Senate of the Methodist Church. It is proud of the number of its alumni who enter the Christian, and particularly the Methodist ministry. The image of the college in the community is strongly Methodist.

Applying the criteria and principles of law we named above to this College, we reach the conclusion that it is sectarian in a legal sense under the First Amendment, and may not constitutionally receive the grant named in the Bill. Whether or not an educational institution is sectarian in such a legal sense is a rather elusive matter, being somewhat ephemeral in nature. Hence, we have deliberately made no attempt to enunciate a hard, fast, and intractable rule in regard thereto, preferring, as indicated above, to decide each case upon the totality of its attendant circumstances.

Here, the stated purposes of the College have a distinctly religious "flavor," and they clearly indicate a considered resolution to promote religious activities and exercises. The Board of Trustees consists of 27 Methodists in a membership of 40, with virtually all of the remainder being Protestants. And, of course, at least one more than one-third must be Methodist Ministers, which "binds the college very closely to the Church." The administrative officers are almost entirely Protestant; and the full-time faculty consists of 30 Methodists in a membership of 51.

We shall not repeat all of what we said above concerning the College's activities. We find nothing on the face of the bill or its legislative history to demonstrate a purpose to use the State's coercive power to aid religion, but a careful consideration of all the facts impels us to the conclusion that the operative effect will be such, if the

grant be effectuated. As stated in footnote 14, "The most effective way to establish any institution is to finance it * * *. Financing a church either in its strictly religious activties or in its other activities is equally unconstitutional * * *." When it is conceded that all the Presidents have been Methodist ministers, that many of the students become seriously interested in religion for the first time, that limited scholarships are given to the children of the ministers of one denomination, that scholarships are awarded to pre-ministerial students of one denomination, that its campus is made available, at cost, to organizations belonging to one faith, that preference is given to "borderline cases" of one denomination in student-body selection, and that the "basic purpose" of the College is to provide the best in higher education "within the framework and atmosphere of the verities and values of *our* (emphasis ours) Christian faith," et cetera, how can it seriously be argued that a grant of tax-raised funds to such an institution would not be "to support * * * religious activities or institutions, whatever they may be called or whatever form they may adopt to teach or practice religion"?

Moreover, the College has made no attempt (possibly due to the fact that the opinion had not been filed when the testimony herein was taken) to comply with the requirement set forth by this Court in *Murray, Etc., supra, i.e.*, "if a statute furthers both secular and religious ends, an examination of the means used is necesary to determine whether the State could reasonably have attained the secular end by means which do not further the promotion of religion." The appellants suggest that the State could have accomplished the secular purpose desired, without the question of religious activities becoming involved, by making the same grant to any one of several non-sectarian educational institutions in the State.

Without laboring the question further, we hold that Chapter 546 transgresses the proscriptions of the Establishment Clause, consequently, it is unconstitutional and invalid.

Notre Dame

Chapter 66 of the Acts of the General Assembly of 1962 grants $750,000 to this College to aid in the construction of a science building.

Notre Dame's stated purposes are deeply and intensely religious. The theory of Catholic education is that Prayer, Holy Mass and the Sacraments represent "the Unifying forces," and "the instructional program interlocks with the non-instructional program; objectives with methods and means, and all to an essential, interwoven unity." "All of [the College's] objectives are implemented in some degree in every department." The institution's "whole life is lived in the Catholic atmosphere, which assumes that earthly life is to be lived * * * in terms of a preparation for the future life with God," and to that end, it "harmonizes" its entire "program with the philosophy and theology of the Catholic Church." The entire program of the College is so ordered "that [the student's] life and study and the atmosphere of the college are *permeated, motivated, enlarged and integrated by the Catholic way of life* as developed and expressed in the daily prayer, liturgy, Sacraments and Holy Mass of the Church." (Emphasis ours.) "And Outward Grace * * *. Since the Christ-thought, the Christ-word and the Christ-deed are the norms of community living in a Catholic college for women, intimations of this presence should be found everywhere: In the Chapel — [and] in the Class Room * * *." "This expresses our aim to have the spiritual support and vivify the whole college atmosphere." Extracts taken from Exhibits in evidence. "God bless you and your apostolate in the home, classroom, laboratory, business office, etc. Gratefully in Our Lady." (Sentence from a letter of Sister Miriam to the Girls of 1961.) "Make your payment a Christmas Gift this year. Help meet the $750,000 Matching Grant for the Science Building [the building involved in the grant under Chapter 66]. * * *. And you know that your gift to the College is a gift to God for the furtherance of his work. May the Christ Child bless you for your gen-

erosity * * *." (Letter from Sister Miriam dated December, 1962).

If erected, each class in the new science building will open with a prayer.

The governing board is controlled by a Catholic religious order whose members are completely committed to Catholic discipline and educational philosophy. The administration is almost entirely religious. The faculty are predominantly nuns who are appointed by the Provincial Superior of the religious order (who is Chairman of the governing board), in consultation with the President, who is also a member of the order. Administration and faculty are chosen on the basis of commitment to the college objectives and ideals, and are overwhelmingly Catholic. Ten per cent of the students are candidates for a religious order and more than 97% of the whole student body are Catholic. This percentage cannot be deemed coincidental.

The college is owned and has been given heavy financial assistance by the religious order. It is officially a member of, and supports, a number of distinctly Catholic associations and institutions. It makes its campus available for use by the Catholic Church and related groups, but not to non-Catholic organizations. It has close ties with the Archdiocese of Baltimore.

Catholicity permeates the college program: the physical surroundings; the rich variety of college-sponsored, exclusively Catholic observances, many of which are compulsory for Catholic students, if not for the entire student body; the curriculum; extracurricular activities; and the student advisory and counseling program.

The college and the accrediting agencies report a high level of success in achieving the religious objectives of the institution. The alumnae, individually and as an organization constituting "an integral part" of the college activity, are deeply engaged in the promotion and defense of Catholicism and the Catholic Church.

The college provides supplemental programs of strong Catholic religious content for nuns teaching in parochial schools and in its Adult Institutes for the community at large. Its image in the community, as expressed in its publications, constituencies, relations with the Archdiocese, ceremonies, and way of life in general, is distinctly and intensely Catholic.

As the situation presented by the facts relating to St. Joseph College are so analogous to those regarding Notre Dame, we set forth St. Joseph's fact picture before stating our holdings with reference to Notre Dame.

St. Joseph College

Chapter 545 of the Acts of the General Assembly of 1963 grants to St. Joseph College $750,000 to assist in erecting a science building.

Since the evidence relating to this institution is so similar to that regarding Notre Dame, we curtail, somewhat, our analysis thereof.

The stated purposes of St. Joseph College seem to be even more strongly religious than Notre Dame's. The religious order of dedicated nuns has complete control of the government and administration. The nuns have taken and abide by vows of strict obedience. The faculty is chosen with a view to achieving the religious ideals of the college, both by precept and example, and preference is given to Catholics; it, as a whole, is sympathetic to the Catholic philosophy of education. The majority of the faculty are Catholic priests or nuns, and there are but a small number of non-Catholic members. The student body includes candidates for the religious order, and has consistently been virtually 100% Catholic; approximately 90% of the students are graduates of Catholic parochial high schools. The Catholic character of the student body is achieved by design.

The religious order owns the college through the corporate form and has provided virtually 100% of the financial assistance needed over and above operating income.

The college is affiliated with, and supports, distinctly Catholic associations and institutions, and, like Notre Dame, is a certified affiliate of the Catholic University of America. The supplementary uses of the campus have been exclusively by Catholic religious groups.

The physical surroundings are strongly religious. Religious observance is strongly Catholic, richly textured, and extensively participated in: "In general, the Theocentric orientation of a Christian student's life is encouraged."

The accrediting agencies have specifically found St. Joseph to be accomplishing its religious objectives. The alumnae, individually and as an organization, are distinguished by the number of members of religious orders, the high percentage of active Catholic workers, and the devotion to the alumnae association's objectives: "to promulgate the principles and ideals of Catholicism * * * defending and promoting the interest of the Church, in promulgating Catholic education and in supporting the Church and its activities."

The supplementary instructional programs are strongly Catholic, as is the image of the college in the community.

If erected, the new science building will house crucifixes, "maybe" statues, and "very likely" waterfonts.

Again, we find nothing on the faces of the above two Bills or in their legislative histories to demonstrate a purpose to use the State's coercive power to aid religion, but a consideration of the totality of attendant circumstances impels a conclusion that their operative effect (if the grants be effectuated) demonstrates such a purpose. It must be remembered that here involved are direct grants of tax-raised funds to the educational *institutions*, themselves, which will become the sole owners of the buildings if erected. If appellees' contention that there is nothing in the Establishment Clause which proscribes direct grants to aid and support sectarian educational institutions were correct, it seems that *Everson, supra*, would have been decided quite easily and without dissent, even though no direct grant was there involved. The funds here

involved are entirely different from those in such cases as *Board of Education v. Wheat*, 174 Md. 314, and *Everson, supra*. In *Everson*, the Supreme Court ruled that a State could constitutionally finance bus transportation of children to parochial as well as public schools, on the ground that involved was "public welfare legislation" (protecting *all* children from traffic hazards and dangers), and under the provisions of the First Amendment no State could exclude individuals, *because of their faith*, from receiving the benefits of such legislation. In *Wheat*, this Court ruled constitutional a statute which required the Board of Education (under limitations as to distance, etc.) to carry parochial students to and from their schools upon the same conditions that public-school students were carried, on the ground that the statute protected the safety of the children while en route to and from schools. No direct grants of money or property to any educational institution were involved in either case, but the Supreme Court split 5 to 4 and this Court 5 to 3 on the issues, with vigorous dissents being filed in each case.

In basing its holding in *Everson* on public welfare legislation, the Supreme Court was careful to say:

> "New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution [directly involved therein were students in parochial educational schools — no church, or institution set aside especially for religious worship, was involved] which teaches the tenets and faith of any church."
>
> And "no tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to preach or practice religion."

We do not deem it desirable to add materially to what we have already said with reference to Western Maryland. The facts relating to Notre Dame and St. Joseph speak for themselves. We think they clearly show that the operative

effect of the Bills (if the grants are permitted to be made) demonstrates, in a legal and constitutional sense, a purpose to use the State's coercive power to aid religion; that the grants, if made, would constitute a contribution by the State of tax-raised funds to support institutions which teach the tenets and faith of a particular church; and that the taxes levied to the funds for the grants would be levied to help support religious activities and religious institutions.

We agree with Neil J. McCluskey, S.J., in his work *Catholic Viewpoint on Education*, p. 168, wherein he stated: "The Catholic laity and clergy are fully aware that direct basic support by the government to parochial schools is out of the question" because "the U.S. Supreme Court would interpret such action as a contravention of the Federal Constitution."

We, therefore, hold that both Notre Dame and St. Joseph are sectarian in a legal sense under the First Amendment, and neither can constitutionally receive the grant made to it; hence Chapter 66 of the Acts of 1962 and Chapter 545 of the Acts of 1963 are unconstitutional and invalid.

THE MARYLAND CONSTITUTIONAL CLAIMS.

Under some circumstances, it would be unnecessary to consider these contentions after our holdings above, but, should we find that the grants violated the Maryland Constitution, the Supreme Court might assume a different attitude with reference to reviewing our conclusions than if we decide to the contrary; so we deem it desirable to answer the same.

Article 23 of our Declaration of Rights provides, *inter alia*, that no man should be deprived of his life, liberty, or property except "by the judgment of his peers, or by the Law of the land." Appellants point this out and call attention to the fact that we have held the phrase "Law of the land" herein is the equivalent of "due process of law" as used in the Fourteenth Amendment to the Federal

Constitution. They then argue, "for the same reasons, and on the same authorities, as the grants violate the Fourteenth Amendment's guarantees of due process of law, which have been construed to include *the prohibition against an establishment of religion contained in the First Amendment* (emphasis ours), the grants violate Art. 23 * * *."

It is quite true that we have equated the phrases "Law of the land" and "due process of law." See for example *Matter of Easton*, 214 Md. 176. But the argument loses sight of the fact that the First Amendment is not included in the Maryland Constitution, and we do not have a Court of higher authority than the Court of Appeals to construe our Constitution, which, of course, is not the case when the Federal Constitution is involved. We have found no Maryland case denying the right of the Legislature to make a grant to a private institution provided the money is appropriated and expended for a public use. Cf. *Johns Hopkins Univ. v. Williams*, 199 Md. 382; *Saint John's College v. Maryland*, 15 Md. 330; *St. Mary's Industrial School v. Brown*, 45 Md. 310; *Board of Education v. Wheat, supra*; *Adams v. St. Mary's County*, 180 Md. 550. The grants here under consideration (if effectuated) are clearly ones to be expended for public uses: to assist in educating our citizens. Cf. *Johns Hopkins Univ. v. Williams, supra*. We, therefore, hold that none of the statutes involved violates Article 23.

What we have just said answers appellants' contentions in regard to Article 15. It is true that under this Article the Legislature is inhibited from imposing taxes other than for public purposes. *Baltimore & E.S.R.R. Co. v. Spring*, 80 Md. 510. It is also true that it has been said that what is public purpose for which tax funds may be expended is not a matter of exact definition; it is almost entirely a matter of general acceptation. *Finan v. M. & C. C. of Cumberland*, 154 Md. 563. But at least since the *Johns Hopkins Univ.* case, *supra*, it cannot be doubted that gifts to private educational institutions to aid in the construction of school buildings are expenditures for public

purposes. In the above case it was not even argued that the gift was not an expenditure for a public purpose.

We hold that none of the Acts violates Article 15.

This brings us to a consideration of the final contention to be answered: do the grants violate Article 36, which, in part, provides: "nor ought any person to be compelled to frequent, or maintain, or contribute, unless on contract, to maintain, any place of worship, or any ministry."

Appellants call attention to the similarity of the language just quoted to that in Jefferson's famous Bill passed in Virginia, *supra* (see it also as Document 10, Am. Jur. 2d, Desk Book), cite several out-of-state cases that are rather closely in point, and claim the grants herein violated Article 36. In the light of the history and reasons for the separation-of-church-and-State provisions and the broad scope given the First Amendment by the Supreme Court cases beginning with *Everson, supra*, it cannot be said that the contention is entirely lacking in force, and if it were presented to us as an entirely new proposition, it might raise some doubt as to how it should be answered. Although there does not seem to be any previous decision of this Court directly in point, we think an examination of how, why, and when the provision first came into our Constitution, the changes therein subsequently made, and the decisions of this Court bearing in some degree on the meaning of the provision compel a conclusion that Acts herein involved do not violate Article 36.

Our first Constitution was adopted in 1776, 10 years before Jefferson's Bill referred to above and 11 years before the adoption of the Federal Constitution. This first Constitution granted religious tolerance to all those of the Christian faith; and, with reference to compelling support therefor had substantially the same provision as our current one. Prior to 1776, it had been the practice in Maryland to levy taxes for the support of the Christian religion and also to support the clergy of the Church of England. Article XXXIII of our first Declaration of Rights (the precursor of the present Article XXXVI), after granting

tolerance to those who professed the Christian religion, as we pointed out above, provided that no person ought to be compelled to frequent, maintain, or contribute to maintain any *particular* place of worship or any *particular* ministry. Immediately following, it stated that the Legislature could lay a "general and equal tax for the support of the Christian religion," with the right in the individual taxpayer of "appointing over" the money paid by him "to the support of any particular place of worship or minister * * *." It further provided that the Acts, lately passed, for collecting monies for building or repairing particular churches or chapels should continue in force, and that every encumbent of the Church of England should be entitled to receive "the provision and support established by the act, entitled, 'an act for the support of the clergy of the church of England, in this Province.' "

Notwithstanding the passage of Jefferson's Bill establishing religious freedom and preventing taxation to support any "religious worship, place or ministry" in Virginia in 1786 and the adoption of the First Amendment in 1791 (which at that time did not apply to the states), it was not until 1810[16] that the people of Maryland saw fit to take away the authority of the Legislature to tax to support churches or ministers by amendment of the Constitution. This amendment provided "that it shall not be lawful for the general assembly * * * to lay an equal and general tax, or any other tax * * * for the support of *any religion.*" (Emphasis added.) The Constitution of 1851 granted tolerance and religious liberty to "all persons," and changed the provision under consideration from "any particular place of worship, or any particular ministry" to "any place of worship or any ministry," as it is today.

We have given this brief background of Article 36 to show that Maryland was obviously in no great hurry to

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[16] Four of appellees stated: "It was not until the Constitution of 1851 that the authority of the Legislature to tax for the support of the Christian religion was eliminated." This apparently is in error. See Niles, Maryland Constitutional Law, p. 379; 1 Poore, Charters & Constitutions (1878), 832.

prevent taxation to support certain religions or to grant religious tolerance to all persons, no matter what might be their faith or lack of faith. We indicated above that there are several decisions of this Court that have some bearing upon the issue now under consideration. We shall name some of them. *Wheat, supra,* involved free transportation of children to parochial schools on public-school buses. The Act was challenged as being one that levied taxes for a private purpose, and as being violative of Article 36. After finding that the Act was sustainable under the police power as providing for the safety of children and aiding in enforcing the law requiring children of certain ages to attend school, the Court stated, "this conclusion * * * renders it unnecessary to consider separately the objection that a religious institution is aided. Art. 36 * * *. The institution must be considered as aided only incidently, the aid only a by-product of proper legislative action." This, by implication, was a strong indication that the Court did not consider the Act to violate Article 36, for the Legislature, even in the exercise of the State's police power, cannot transgress specific constitutional inhibitions; hence, had the Act violated Article 36, it would not have been constitutional legislation.

Then there are the cases of *St. John's College v. State,* 15 Md. 330; *St. John's College v. Purnell,* 23 Md. 629; *Allegany County School v. Maffit,* 22 Md. 121; *St. Mary's Industrial School for Boys v. Brown,* 45 Md. 310, 335, 336; *Clark v. Maryland Institute,* 87 Md. 643; *Baltimore v. Keeley Institute,* 81 Md. 106; *Finan v. M. & C. C. of Cumberland,* 154 Md. 563, and possibly others. We shall not analyze the holdings in each of these, for we think Judge Parke, for the dissenting members in *Wheat, supra,* correctly summarized them. He stated:

> "Thus appropriations by the General Assembly of public funds are customarily made and paid to various bodies and institutions throughout the state, which are privately owned and managed, and which are, in many instances, of sectarian origin and character. It will be found, upon examination, that this employ-

ment of public funds has not been for a private purpose but for a public one. It is upon this ground that this employment of public moneys has been sanctioned by the decisions of this court. If an incidental or direct benefit result to the recipient, this resultant advantage becomes immaterial and negligible because of the paramount public and essential nature of the service rendered and of the further factor that the State has either not undertaken or not fully assumed the performance of the public service or function involved. [citation]. *The validity of such grants, when so limited, is not affected by any sectarian circumstances.* [citation]. Thus, *grants to educational institutions* which supply instruction and training in learning and mechanical, industrial, agricultural and other arts of which the State does not offer or undertake to afford universal service [there is no contention that Maryland has ever adopted universal public instruction at the college level] are freely made without reference to whether the recipient be denominational or otherwise. [citation of Maryland cases and legislative grants]. Similarly, the grants in aid of the hospitalization of patients for care and treatment in sickness, injury and disease, [citation] for chronic alcoholism, [citation] for homes for the aged and infirm, for orphans, for children, for the blind, for crippled children, for reformatories and for other purposes which are within the functions of the State as conducive to the welfare of its inhabitants; and pursuant to the mandate of the Declaration of Rights: 'That the Legislature ought to encourage the diffusion of knowledge and virtue, the extension of a judicious system of general education, the promotion of literature, the arts, sciences, agriculture, commerce and manufactures, and, the general amelioration of the condition of the people.' Article 43.

"In these grants the State advisedly *makes no distinction between denominational and non-denominational institutions*, nor has it limited its appropriations to race or color. The grants so made for special public

purposes find at once their justification and vindication in the promotion of the general welfare in those matters of public concern in respect of which the government had not theretofore undertaken completely to perform. In short although paid to a private person, the money is appropriated and expended for a public use." (Emphasis supplied.)

We also see some relationship to our present issue in the holdings in *Baltzell v. Church Home*, 110 Md. 244 (upholding a bequest to the Church Home & Infirmary of Baltimore City, at a time when the Constitution required legislative sanction for gifts, with certain exceptions, to any "religious sect, order or denomination.") and *Mt. St. Mary's College v. Williams*, 132 Md. 184, wherein the College was held not to come within the purview of being a religious sect, order or denomination. Both of these cases followed the lead of *Speer v. Colbert*, 24 App. Cas. (D.C.) 187, aff'd 200 U.S. 130, wherein Georgetown College, which was an educational institution under the control of a religious order, known as the Order of Jesus, was held not to be a sectarian institution or a religious sect, order or denomination. This last case has especial significance, for the law in the District of Columbia was then the same as in Maryland, and the opinion was one of the last of its then Chief Justice Alvey, who had formerly been a most distinguished Chief Judge of this Court and was thoroughly familiar with Maryland law.[17]

Thus it is seen that grants to educational institutions at a level where the state has not attempted to provide universal educational facilities for its citizens have never, in Maryland, been held to be impermissible under Article 36, even though the institutions may be under the control of a religious order. And we see no reason to hold otherwise now. We, therefore, hold that none of the grants violates Article 36.

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[17] And, incidentally, he was also a member of the Constitutional Convention which adopted the Constitution of 1867.

This conclusion is bolstered by the fact that all of the states, except Maryland and Vermont, have explicit provisions prohibiting the appropriation of public money to schools controlled by religious organizations. See Note 50 Yale L.J. 917 for 46 of them, and we are informed that the Constitutions of Alaska and Hawaii have explicit provisions also. Had the people of Maryland desired to change its practice relative to such grants, it certainly would be likely that they would have made similar provisions after so many states had done so.

Also, the Department of Health, Education and Welfare Misc. Doc. No. 28, *The State and Non-Public Schools,* pp. 16-17 filed as Plaintiffs' Ex. 113, cites Maryland as having no specific provisions against grants to religious schools.

Decree Affirmed In Part, and Reversed In Part; and Cause Remanded For The Entry Of A Decree In Accordance With This Opinion. The Costs To Be Paid ¼ by the Appellants, ¼ by Western Maryland College, ¼ by St. Joseph College, and ¼ by Notre Dame College.

DISSENTING OPINION OF COURT OF APPEALS OF MARYLAND

Hammond, J., dissenting (Horney and Marbury, concur):

I agree with my brethren of the majority that the individual appellants have standing and that the capital grants under review do not offend or violate Art. 15, Art. 23 or Art. 36 of the Maryland Declaration of Rights. I cannot agree with their conclusions that the grants by the State of Maryland to Western Maryland College for buildings to be used as a science wing and a dining hall and to St. Joseph College and the College of Notre Dame of Maryland for science buildings, amount to the establishment of religion by the State contrary to the mandate of the first

amendment to the Constitution of the United States, made binding on the states, under the decisions of the Supreme Court, by the fourteenth amendment.

There can be no rational doubt from the evidence in the record and facts that properly can be judicially noted, of the following:

(1) that the State of Maryland has for over a hundred and eighty years followed a general, systematic and non-discriminatory pattern of financial assistance to private institutions furnishing a higher secular education. In 1784 the Legislature granted an annual sum of 1250 pounds for the use of St. Johns College (Ch. 37). By Ch. 107 of the Laws of 1798 there was authorized an annual grant to Charlotte Hall School (which had been founded by the established church before the Revolution). In *Johns Hopkins Univ. v. Williams,* 199 Md. 382, 399-400, Chief Judge Marbury, for the Court, listed capital grants by the State to institutions of higher learning in Maryland from 1904 to 1937.[1]

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[1] Thus, in 1904, nearly fifty years ago, a public building loan in the amount of $1,625,000 was authorized by Chapter 228 of the Acts of that year. Of that amount $57,000 was for the purpose of construction and completion of buildings for the Maryland Agricultural College, which was the collegiate predecessor of the University of Maryland at College Park. At that time, the Maryland Agricultural College was a semi-public institution, having both public and private stockholders, and one-half of its property was owned by the State, so that the appropriation to it is not, perhaps, a perfect legislative interpretation. However, in the same act, $5,000 was given for the construction of buildings at Charlotte Hall School, a privately owned institution, $5,000 for construction of St. Mary's Academy, a similar institution, and $175,000 for the purchase of a lot of ground in Baltimore for the Maryland Institute, also a private institution, and for the construction of a building thereon. This was followed in 1912 by Chapter 90 of that year, which provided for the issuance of $600,000 worth of the State's bonds, the proceeds of which were to be paid to the Johns Hopkins University for the erection of a technological school. That act also included an annual appropriation for maintenance, and provided for scholarships, and it might possibly be argued that the scholarships constituted a consideration. However, in 1922 by Chapter 464, a general construction loan of $1,750,000 provided for a gift from the proceeds of $20,000 to St. John's College

(2) that under both Maryland law and federal constitutional standards such grants are for a public use and purpose. The Maryland Declaration of Rights provides in the opening sentence of Art. 43:

> "That the Legislature ought to encourage the diffusion of knowledge and virtue, the extension of a judicious system of general education, the promotion of literature, the arts, sciences, agriculture, commerce and manufactures, and the general melioration of the condition of the People."

In his dissent in *Board of Education v. Wheat*, 174 Md. 314, 335-37, Judge Parke well summarized practice and law in a discussion, as to the correctness of which, there can be no real disagreement. He said:

> "Neither the payment of money by the State to a private person, whether corporate or otherwise, nor the nature and occupation of that person, is determina-

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for a new heating plant, and $30,000 to Washington College for and on account of its indebtedness. In 1924, there were four acts passed. Chapter 274 authorized a St. John's College loan in the amount of $110,000, the proceeds of which were to pay the present indebtedness of the college. Chapter 280 created a state debt of $2,460,000, and of the proceeds $100,000 was given to St. John's College for equipment and necessary construction purposes. By Chapter 366, the Western Maryland College loan of $125,000 was created, to be turned over to the Board of Trustees of Western Maryland College for the construction and equipment of a science building. By Chapter 369, a state debt of $100,000 was authorized, proceeds to be given to the Board of Visitors and Governors of Washington College for equipment and construction. In 1927, by Chapter 666, the Morgan College loan of $125,000 was created, the proceeds to be used for the construction and equipment of an industrial science building at Morgan College, then a private institution, but later acquired by the State. In 1937, by Chapter 487, a general bond issue of $9,052,000 was authorized, of which $162,000 went for the construction of buildings at Bowie Normal School, and $25,000 for the construction of an improved water supply at the Maryland Training School for Boys. In 1929, by Chapter 263, a state debt of $50,000 was created, to be used for the payment of the deficit in constructing and equipping the new buildings at Charlotte Hall School. All of these recipients were private non-profit corporations."

tive of the purpose of the payment. Thus appropriations by the General Assembly of public funds are customarily made and paid to various bodies and institutions throughout the state, which are privately owned and managed, and which are, in many instances, of sectarian origin and character. It will be found, upon examination, that this employment of public funds has not been for a private purpose but for a public one. It is upon this ground that this employment of public moneys has been sanctioned by the decisions of this court. If an incidental or direct benefit result to the recipient, this resultant advantage becomes immaterial and negligible because of the paramount public and essential nature of the service rendered and of the further factor that the State has either not undertaken or not fully assumed the performance of the public service or function involved. *Clark v. Maryland Institute,* 87 Md. 643, 41 A. 126; Article 43 of Declaration of Rights. The validity of such grants, when so limited, is not affected by any sectarian circumstance. *St. Mary's Industrial School for Boys v. Brown,* 45 Md. 310, 335, 336. Thus, grants to educational institutions which supply instruction and training in learning and mechanical, industrial, agricultural and other arts of which the State does not offer or undertake to afford universal service are freely made without reference to whether the recipient be denominational or otherwise. *St. John's College v. State,* 15 Md. 330; *St. John's College v. Purnell,* 23 Md. 629; *Allegany County School v. Maffit,* 22 Md. 121 * * *.

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"In these grants the State advisedly makes no distinction between denominational and non-denominational institutions, nor has it limited its appropriations to race or color. The grants so made for special public purposes find at once their justification and vindication in the promotion of the general welfare in those matters of public concern in respect of which the government had not theretofore undertaken com-

> pletely to perform. In short, although paid to a private person, the money is appropriated and expended for a public use."

In *Everson v. Board of Education,* 330 U.S. 1, 7, 91 L. Ed. 711, 719, Justice Black, for the majority of the Court, found New Jersey constitutionally could tax A to reimburse B for the cost of transporting B's children to a church school. He said:

> "It is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose. *Cochran v. Louisiana State Board of Education,* 281 U.S. 370 * * *."

(3) the four donee colleges here involved all furnish a secular liberal arts education comparable to that furnished by other first rank liberal arts colleges in the United States and are accredited by standard accrediting agencies. The courses taught in the four donee colleges are taught in substantially the same manner as at other similar colleges, for example, Johns Hopkins or Goucher, and are not used as vehicles for religious indoctrination; the text books are chosen by the individual teachers for their merit in supplying knowledge of the course and are not chosen for their religious orientation or because of the religion of the author and, in most instances, are the same texts that are used at other public and private colleges. No doctrine, dogma or other teaching of any church enters into or interferes with the teaching of the secular subjects that are taught. Graduates of the four donee colleges go on to take graduate studies and obtain degrees on an equal basis with graduates of other public and private colleges at universities offering the best post graduate courses, such as Johns Hopkins and Columbia. There are no religious requirements, oral or written, for admission of students to the donee colleges and, finally, the buildings to be erected with the funds granted will be places which will further the secular training offered by the colleges and not used for religious ceremonies or instruction.

(4) the factors of (a) a rapidly expanding population of the State and the Country, (b) an increasing proportion of that part of the population of college age which attends college, and (c) an ever more complex society which requires ever more highly developed skills of more people in order to supply individuals competent to conduct the affairs of government and the private economy and furnish professional and scientific services, have strained college facilities, physical and human, to the limit, if not beyond, and will combine to require more and more such facilities. Private colleges furnish a most significant help in offering the collegiate and graduate training now available. It is said that there are some 2000 private institutions of higher learning in the Country, of which 800 are church-related. See 109 Cong. Rec. 18406 (daily ed. Oct. 11, 1963). If they are to continue to do their part and bear the new load of increased enrollments, they must have new facilities and, since private colleges traditionally have financial problems which limit their expansion, much of the cost of new facilities must come from government, if it is to come at all. The State of Maryland, as has been noted, has recognized this since early times and the federal government likewise has been aiding institutions of higher learning since the passage of the Morrill Land Grant Act of 1862. Federal funds which go to colleges and universities, a number of them sectarian, for research contracts, loans and outright grants currently exceed two billion dollars a year.

It is in this setting and with this background that the constitutionality of the grants made by the Maryland Legislature to Hood, Western Maryland, Notre Dame and St. Joseph Colleges should be considered and determined. The decisive issue cannot be said to be simple, but it is narrow — does State financial assistance to the secular educational facilities of a college which is sponsored or controlled by a church or a religious order and in which there is a religious atmosphere amount to the establishment of religion within the meaning of the words of the first amendment as those words have been construed recently by the Supreme Court. The case of *Everson v.*

Board of Education, 330 U.S. 1, 91 L. Ed. 711, which occasioned the dicta by Justice Black as to what the State cannot do lest it breach the "wall of separation" between church and state, which he repeated in *McCollum v. Board of Education,* 333 U.S. 203, 92 L. Ed. 649, and *Torcaso v. Watkins,* 367 U.S. 488, 6 L. Ed. 2d 982, and Chief Justice Warren quoted in *McGowan v. Maryland,* 366 U.S. 420, 6 L. Ed. 2d 393, which both the appellants and the majority of the Court heavily stress and rely on, *held* that the furnishing of money by the state to reimburse parents for the cost of transporting their children to parochial schools did not violate the provision of the first amendment that no law shall be made "respecting an establishment of religion." *McCollum* is not in point since it dealt with the action of a public school administration in relation to public sponsorship of religious exercise or instruction in the public schools.

Torcaso, as I read it, held that the Maryland prerequisite of an oath of belief in God to becoming a notary public was invalid because it employed an essentially religious, although non-sectarian, means to achieve a proper secular goal — worthy notaries public — to which the means had no reasonable relation. *McGowan* held that Sunday Closing Laws as presently written and administered "bear no relationship to establishment of religion as those words are used in the Constitution of the United States," since they serve a proper secular purpose and the aid they give to religion is incidental.

Following the decision of the Supreme Court in *Engel v. Vitale,* 370 U.S. 421, 8 L. Ed. 2d 601, which held that the organized recital in New York public schools of the so-called Regent's prayer violated the establishment of religion clause, public frustration and resentment with the Court's views and interpretation of that clause increased and there was widespread criticism of decisions on the point, ranging from the reasoned and tempered suggestions of Professor Sutherland in *Establishment According to Engel* in 76 Harv. L. Rev. 25 that the reasoning and result of *Engel* were unsound to ill-advised and intemperate com-

ments, often based on a misunderstanding of the basis and effects of the decisions. In deciding *Abington School Dist. v. Schempp*, 374 U.S. 203, 10 L. Ed. 2d 844, which held that the reading, without comment, at the opening of each school day, of verses from the Bible and recitation in unison of the Lord's prayer, violated the establishment clause, the Court, in the traditional way of courts, did not acknowledge error and adhered to its views but was particularly careful in its opinion to in effect answer criticism by specifying just what had been held before and was being held then, and to say, with words chosen even more carefully than usual, just what the law was. For this reason I ascribe great weight to *Schempp* as a guide to what will and what will not offend the establishment rule the Court has drawn.

Justice Clark, for the Court, pointed out that religion consistently has been identified with our history and government and that religious freedom is imbedded in our public and private life. He then reviewed the prior cases and their holdings and dicta, and said:

> "As we have indicated, the Establishment Clause has been directly considered by this Court eight times in the past score of years and, with only one Justice dissenting on the point, it has consistently held that the clause withdrew all legislative power respecting religious belief or the expression thereof. The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be *a secular legislative purpose and a primary effect that neither advances nor inhibits religion*. *Everson v. Board of Education, supra; McGowan v. Maryland, supra*, at 442." (Emphasis supplied.)

Murray, Etc. v. Comptroller, 241 Md. 383, 398, upheld the validity of tax exemptions (equated to direct grants

which indubitably benefitted the recipient religious group) to religious organizations and in its opinion by Judge Oppenheimer synopsized the Supreme Court decisions as holding that:

> "If the primary purpose of the state action is to promote religion, that action is in violation of the Amendment, but if a statute furthers both secular and religious ends, an examination of the means used is necessary to determine whether the state could reasonably have attained the secular end by means which do not further the promotion of religion."

I think that the four grants under consideration were made pursuant to long-established practice to further a secular public purpose and that any aid or benefit flowing from them to religion would be slight, vague and purely incidental. The grants will supply added facilities which will help the secular educational activities of religious groups and will aid students who now and hereafter attend the institutions and the people of the State of Maryland by increasing the number of those who can receive a college education and the quality of the education that the increased number will receive. The grants will not aid religion or a religious group; those who attend college are or are not at that age religiously inclined and if they are, have, in almost all cases, become attached to a particular faith. Students are not proselytized at any of the four donee colleges. It will not aid religion or the Catholic Church for more students, mostly Catholic to be able to attend St. Joseph or Notre Dame, or the Methodist Church for more students, largely Methodists, to attend Western Maryland College (and in both cases to receive perhaps a better education because of the grants) to a degree greater than it will society in general. The benefit to religion or a religious sect is as small and as incidental as was the benefit to religion and most church groups in *McGowan* and to the parochial schools in *Everson* — more students were enabled to attend parochial schools by reason of the grants approved in *Everson*. If it be delicately suggested that perhaps *Everson* might not be decided in 1966

or thereafter as it was in 1947, there are at least two answers. One, the suggestion makes it only one of a relatively large number of cases and judges of a rank below the Supreme Court should not indulge in judicial speculation as to what that Court will do. Two, *Everson* has not yet been overruled and the Supreme Court in 365 U.S. 299, 5 L. Ed. 2d 688, dismissed the appeal in *Snyder v. Town of Newton* (Conn.), 161 A. 2d 770 (which upheld a Connecticut law authorizing transportation by a town of children to a parochial school) "for want of a substantial federal question," and *Everson* was cited with approval in *Schempp*.

There is no reasonable alternative to State aid to private institutions of higher learning. Theoretically, the State might enlarge State colleges enough to care for all actual and potential students or create new public colleges to do so. Tremendous sums would be required in either case and, what is more important, available physical facilities and faculty and administrative staffs could not be produced for years. In the Note, *Constitutionality of Federal Financial Aid to Church-Related Colleges*, 77 Harv. L. Rev. 1353. 1358, the author points out that of the 2,000 institutions of higher learning in the United States 800 are church-related, and says:

> "To exclude these 800 institutions of higher learning from federal aid would seriously hamper the effort to increase enrollment capacity to the point where colleges will be able to handle the expected demand of 1970 and distort the present educational allocation of students between denominational and nondenominational schools. * * * Such pragmatic considerations would be irrelevant if the command of the Constitution were clear; the remedy would then be a constitional amendment. However, the lack of an effective alternative should be highly relevant when a plausible constitutional defense can be made and where, in an area of church-state overlap, criteria can be formulated which minimize governmental intrusion into religious concerns without paralyzing governmental attempts to cope with urgent national problems."

On the question of constitutionality, the author, at pp. 1356-57, says:

> "On the other hand, the opinions of Justices Clark and Brennan in *Schempp* indicate that federal aid to education would be considered constitutional. For example, Justice Clark enunciated the test of constitutionality to be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. Similarly Justice Brennan would draw the line at legislation employing the organs of government for essentially religious purposes or using essentially religious means to serve governmental ends where secular means would suffice. Under either test, the act would appear to be free from constitutional flaws."

and indicates his view that state aid to church-related colleges is constitutional.

As did Judge Duckett below, I think the grants should be declared valid. Early federal and state cases which, in addition to authorities already cited, support this view include, in Maryland: *Baltzell v. Church Home*, 110 Md. 244 (the home was affiliated with and supported and controlled by the Episcopal Church, and the Court found a gift to it needed no legislative sanction as required for a gift to any "religious sect, order or denomination"); *Mt. St. Mary's v. Williams*, 132 Md. 184 (holding the Catholic college not to be a religious sect, order or denomination): See also *St. John's College v. State*, 15 Md. 330 (St. John's was then closely related to St. Anne's Church in Annapolis); *St. Mary's Indus. School v. Brown*, 45 Md. 310; *Finan v. M. & C. C. of Cumberland*, 154 Md. 563 (part of proceeds of a bond issue went to Sisters of Charity of the Catholic Church for their hospital); and *Board of Education v. Wheat*, 174 Md. 314, referred to earlier.

Federal cases include *Colbert v. Speer*, 24 App. D.C. 187, *aff'd Speer v. Colbert*, 200 U.S. 130, 50 L. Ed. 403 (Georgetown College, run by an Order (Society of Jesus) of the Catholic Church, was held not to be a sectarian institution or a religious sect, order or demonimation):

Bradfield v. Roberts, 175 U.S. 291, 44 L. Ed. 168 (Commissioners of the District of Columbia paid a Catholic hospital — run by the order which runs St. Joseph College — out of funds appropriated by Congress — so much per poor patient. It was held that neither the appropriation nor the payments violated the first amendment); and *Cochran v. Board of Education*, 281 U.S. 370, 74 L. Ed. 913 (it was held constitutional for the State to furnish free textbooks to all students, including those used by students in parochial schools).

Judge Horney and Judge Marbury concur in the view herein expressed and, as would I, would affirm.

CIRCUIT COURT FOR ANNE ARUNDEL COUNTY

OPINION

by

O. Bowie Duckett, Associate Judge
Fifth Judicial Circuit

QUESTIONS FOR DECISION

The primary question to be decided in this case is whether or not it is lawful for the State of Maryland to appropriate large sums of money to four church connected colleges. The main obstacle to these grants is the First Amendment to the United States Constitution, which invalidates any law which advances or suppresses religions.

There are also several subordinate questions such as the right of the Plaintiffs to sue and the effect of the Maryland Constitution on the appropriations, especially *Article 36 of the Maryland Declaration of Rights*, which provides, inter alia: "nor ought any person be compelled to * * * maintain or contribute * * * to maintain, any place of worship, or any ministry; * * *."

FACTS

The General Assembly of Maryland during 1962 and '63 made four separate grants totaling 2½ million dollars to four Maryland Colleges for the purpose of aiding in the

construction of several school buildings. A summary of these grants is as follows:

Statute	*Recipient*	*Purpose*	*Amount*
Chap. 546, Acts of 1963	West. Md. College	Science Wing & Dining Hall	$500,000.
Chap. 545, Acts of 1963	St. Joseph's Coll.	Science Bldg.	750,000.
Chap. 88, Acts of 1962	Hood College	Dormitory & Classroom Bldg.	500,000.
Chap. 66, Acts of 1962	College of Notre Dame of Maryland	Science Bldg.	750,000.

Each Act provided that the recipient would privately obtain elsewhere an equal and matching sum for the aforesaid buildings.

The parties agree that all of the Colleges involved are related in some way and some degree to religion and to a particular Church. The extent of this Church relationship varies and it is one of the difficult questions in the case to decide, whether one or more of these institutions is legally sectarian as contrasted to secular.

A thumbnail sketch of the four institutions, making special reference to religious connections and purposes follows:

Hood College

Hood College of Frederick, Maryland was founded in 1893 by the Reformed Church in America, now the United Church of Christ. It is controlled by a Board of 30 Trustees of whom 7 are selected by the United Church. There is no requirement that the administrative officers or members of the faculty have any religious affiliation except the chaplain, who is required to be a member of the United Church of Christ. One of its charter provisions is the maintaining of a college for the promotion and advancement of education of women and the cultivation and diffusion of literature, science and art. In an enrollment of 676, the students are roughly affiliated as follows: Episcopalian — 146; Presbyterian — 108; United Church of Christ — 89; Methodist — 83; Roman Catholic — 72; Lutheran — 55; Jewish — 29; Baptist — 11; Non-affiliated — 4; other various religions — 79.

Hood grants the Degrees of Bachelor of Arts and Bachelor of Science in Home Economics. It requires 124 semester hours of credits for graduation, but no course is designed as training for the ministry or other religious life except that 2 semesters are required in religion in which the Old Testament and New Testament are covered including an introduction to the Bible, which is a critical study of Biblical History, Literature and Religion. Hood makes some attempt to require its students to attend approximately 14 Wednesday evening services in the Chapel and 7 Sunday evening services also in the Chapel per semester; 3 cuts are permitted from each of these programs. The College invites ordained ministers of various denominations to act as speakers.

Hood receives approximately $45,000. annually from the United Church of Christ for operational purposes, which amounts to approximately 2.2 percent of its operational budget. Hood has also received funds from the National Science Foundation for the purchase of scientific equipment and an award from the Atomic Energy Commission for the purchase of laboratory equipment, in addition to other governmental grants and awards.

Western Maryland College

Western Maryland College, founded in 1867 and located in Westminster, Maryland, is a coeducational liberal arts College associated with the Methodist Church. Its charter prohibits any religious or civil test for the admission of any student, teacher or official. The management of the College is entrusted to an independent self-perpetuating Board of Trustees currently numbering 40. One more than one-third of the number of such Trustees are required to be Methodist Ministers. Courses of instruction are offered in all subjects ordinarily taught in a liberal arts college. There are no courses in the curriculum specifically designed for the professional training of the ministry or other religious work, but there is a course in Biblical Literature which is required of all students for graduation. During each semester 10 chapel services, 7 lecture assem-

blies and 3 evening concerts are scheduled. Of these 20 events, students are required to attend 13.

Approximately $40,000. is contributed to the College annually by the Methodist Church, which sum amounts to approximately 2¼ percent of the Defendant's operational budget. All Presidents of Western Maryland have been Methodist Ministers. In a faculty of 76, 64 are Protestant, 5-Catholic, 1-Jewish, 1-Mohammed and 5 unaffiliated. The student body totals 755, of which there are 303 Methodists, 82 Lutherans, 80 Presbyterians, 63 Episcopalians, 53 Catholics, 47 Jews, 35 of other religions and 27 with no affiliation. Children of Methodist Ministers receive a 50 percent reduction in tuition. While the College frequently offers its facilities for church meetings and conferences, it also furnishes its campus buildings and grounds to non religious groups as, for example, the Baltimore Colt Football Team. Students are required to participate in 5 of the 10 chapel services per semester. A course in Biblical Literature consisting of 3 semester hours of credit out of a total number of 128 credits is required for graduation. The Biblical Literature course is essentially literary and a student may fulfill the requirement by taking either the Old Testament or the New Testament.

College of Notre Dame of Maryland

This College, located in the City of Baltimore and founded in 1895, was the first Catholic College for women in the United States. It was originally organized as a liberal arts college for women by the School Sisters of Notre Dame, a community of women of the Roman Catholic Church devoted exclusively to education. Since 1957, the College has operated as a separate corporate entity under a Maryland charter, its corporate purpose being to establish, take over, organize, carry on and conduct a college or university of education, for the promotion of learning and for general educational purposes. The College is governed by a Board of 7 Directors, of whom 5 are required to be Sisters of Notre Dame and 2 lay persons of no specified faith, but both of whom are, in fact, Roman Catholics. No religious affiliation is required for admission

of students but approximately 98 percent of the students are Roman Catholic. With a faculty of 85, 44 are members of religious orders. There are 41 lay teachers of whom 33 are Roman Catholic and 8 non-Catholic. The student body numbers approximately 700. The College campus contains many religious statues and symbols; religious garb is worn by the religious teachers. Prayers are usually said before each class. A three-day religious retreat was formerly compulsory and students were honor bound to attend. Finding that many students falsified their attendance, the rule was rescinded. The normal degree requirement is 128 semester hours of credit. Required courses in religion and philosophy vary from 20 to 30 credits.

St. Joseph's College

St. Joseph's College located in Emmitsburg, Maryland, was founded in 1809 by Mother Seton, a prominent pioneer in Catholic education in American. In 1902, the College was empowered by the State of Maryland to confer degrees and since that date it has continued a four-year College of liberal arts and sciences, including nursing, mainly for Catholic women, although a particular religious affiliation is not required for admission. The Board, which exercises all the powers of the Corporation may have not less than 5 or more than 15 members. Five Sisters or Nuns are named to the Board in the Charter. The remaining members are designated by the Board and may include up to 2 laymen, however, it is customary for all the members of the Board to be Sisters of the governing Order.

There are 13 administrative officers; all are Roman Catholics; 10 being religious and 3 lay. The faculty is composed of 72 teachers, of which 37 belong to religious Orders and 35 lay teachers. Of the lay teachers, 8 are non-Catholics.

The present student enrollment is approximately 665, of whom 135 are Sisters or Postulants. Over 98 percent of the students are Roman Catholics. The program in Religion and Philosophy is substantially the same as that of Notre Dame. Of the 128 credits required for graduation,

there are 16 required credits in Theology and 12 in Philosophy; however, students who are not Catholics are not required to enroll in religious courses. Religious services are held on the campus for Catholic students and attendance of Catholic students is required at 2 such services each week. Attendance of religious services is not required of non-Catholic students. Like Notre Dame, the College campus contains many religious statues and symbols; religious garb is worn by the religious teachers and religious holidays are observed. Generally, it is unnecessary for the College to require religious observance as the same is required by the student's religion.

PRELIMINARY QUESTION

The first question to be decided is whether the Plaintiffs have standing to bring this suit. The answer to this question in so far as the Horace-Mann League is concerned is clearly "no". The Horace-Mann League pays no state taxes, nor does it claim to have any other interest which could conceivably be injured by the alleged unlawful expenditure of public funds. The law is well established that such a non-profit corporation has no standing in its own name to complain of legislative action even though it affects the rights of its members or stockholders. *Bar Assoc. v. District Title Co.*, 224 Md. 474 (1961) 168 A. 2d 395; *Md. Naturopathic Assoc. v. Kloman*, 191 Md. 626 (1948), 62 A. 2d 538; *Israel Dvorine, et al. v. Castelberg*, 170 Md. 661, 185 A. 562.

A determination of whether the individual Plaintiffs have standing to sue presents some difficulty. All of these individual Plaintiffs are taxpayers and pay taxes on real estate totaling an assessed value of approximately $160,000. Moreover, this is a taxpayer's suit and is not only brought by the above mentioned Plaintiffs but also on behalf of all other taxpayers of the State similarly situated.

The law on this question was recently reviewed by Judge Horney in *Citizens Committee v. Co. Comm.*, 233 Md. 398 (1964). I find that the Maryland Court of Appeals in recent years has become more demanding in requiring that

Plaintiff taxpayers show a special interest before attacking the legality of legislation.[1] Some of the broad language in the *Citizens* case may appear to hold that the individual plaintiffs have no standing to maintain this suit. However, in my opinion the present Plaintiffs under the particular circumstances alleged do have sufficient standing to sue. First, because of the importance and urgency of the question and its ripeness for decision; and secondly, the Plaintiffs are real and personal property taxpayers and therefore have a special interest in the appropriations, different from that of the general public and even from other classes of taxpayers. The statutes involved in this case levy only real and personal property taxes and those in an amount merely sufficient to fund the challenged expenditures. Moreover, it must be realized that the Court of Appeals in the recent opinion quoted above cited with approval many of its older decisions, one of them being *Sun Cab Co. v. Cloud,* 162 Md. 419, 159 A. 132 (1932) where Chief Judge Bond speaking for the Court said, on page 427:

> "[T]axpayers interested in avoiding the waste of funds derived from taxation which would be involved in conducting the void referendum may make application to the court for the remedy * * * The property loss to them, or the loss of civil rights, which, according to our rules must be established as a foundation for the interposition of a court of equity, may be small, when apportioned among them. Probably the loss to one taxpayer in any such proceeding seldom amounts to twenty dollars, the minimum of the debt or damage which a court of equity may consider * * * But, when a suit is instituted by one or more taxpayers in representation of all, the case is quite different. The amount involved and sought to be protected is then the total amount of loss to taxpayers, or the total amount which may be wrongfully expended * * *

[1] Many Courts have recognized the dangers in what has come to be known as "government by judicial decree" in which almost every action taken by the government is subject to judicial review and approval. Time does not permit me to develop this matter and furthermore, it is unnecessary for this decision.

> [A] bill filed in the name of one or more of the taxable inhabitants for themselves and all others similarly situated the court should regard as 'in the nature of a public proceeding to test the validity of the corporate acts sought to be impeached and deal with and control it accordingly' * * * Therefore the conclusion of the court is that the taxpayers' suit may be maintained in this instance".

The *Sun Cab Company* case has not been overruled by our Highest Court and I am of course bound by it. See also: *Balto. Assoc. v. Liquor License Comm.*, 171 Md. 426, 189 A. 209 (1937); *Hammond v. Lancaster*, 194 Md. 462, 71 A. 2d 474 (1950); *McKeldin v. Steedman*, 203 Md. 89, 98 A. 2d 561 (1953); *Reed v. McKeldin*, 207 Md. 553, 115 A. 2d 281 (1955); *Pressman v. D'Alesandro*, 221 Md. 50, 125 A. 2d 35 (1956); *Berghorn v. Reorganized School Dist.*, 364 Mo. 121, 260 S.W. 2d 573 (1953).

Burden on Plaintiffs

Not only is the burden of proof on the Plaintiffs in this litigation, but in considering the validity of these enactments it is well established that "Every intendment must be resolved in favor of the constitutionality of an act of the Assembly. We must not try to find reasons to hold a law unconstitutional. If it is not clearly so, its constitutionality must be upheld." *Johns Hopkins Univ. v. Williams*, 199 Md. 382 at 401, 86 A. 2d 892, 902.

Subordinate Question

Does the Maryland Constitution Forbid Grants of Public Money to Church Connected Institutions?

Plaintiffs appear to have abandoned their reliance on all sections of the Maryland Constitution except Article 36 of the *Maryland Declaration of Rights*, therefore, I shall not discuss the other sections of the Maryland Constitution alleged in the Bill of Complaint but merely hold them inapplicable for the purpose of this decision.

Article 36 of the *Maryland Declaration of Rights* provides, in part:

> "* * * nor ought any person be compelled to * * * maintain, or contribute * * * to maintain, any place of worship, or any ministry; * * *"

A review of the cases on the general subject decided by the Court of Appeals leads me to the conclusion that our Highest Court makes little or no distinction between a sectarian or secular institution receiving an appropriation, provided the money is used to perform a public service as, for example, health, education and general welfare of our citizens.

Back in 1876, the Court of Appeals in *St. Mary's Industrial School v. Brown,* 45 Md. 310, said at page 336:

> "The fact that the institution may be under denominational or religious control, can in no manner affect their qualification for assuming such relation to the City, or for the full and faithful discharge of the duties that they may contract to perform. Charity, to say the least of the matter, is quite as likely to be fully and faithfully administered under such auspices as it could be under any other. It could, therefore, be no objection that the institutions are or may be under the control and influence of those belonging to any particular church or denomination."

Likewise, in *Finan v. M. & C. C. of Cumberland,* 154 Md. 563 (1928), the Court of Appeals upheld the validity of a municipal appropriation in aid of the construction of a hospital operated by a group of Roman Catholic Nuns in Cumberland, Maryland.

The most noted case in Maryland is *Bd. of Ed. v. Wheat,* 174 Md. 314, 199 A. 628 (1934), involving the validity of bus transportation for parochial school children. Chief Judge Bond, speaking for the majority of the Court, upheld the law and said at page 323:

> "This conclusion that the act must be regarded as one within the function of enforcing attendance at

> school, renders it unnecessary to consider separately the objection that a religious institution is aided. Art. 36, Declaration of Rights. The institution must be considered as aided only incidentally, the aid only a by-product of proper legislative action."

I shall not discuss the exhaustive dissenting opinion by Judge Parke as parts of this opinion are favorable to each side of the controversy.

The Court of Appeals reaffirmed its position in the *Wheat* case in *Adams v. St. Mary's Co.*, 180 Md. 550 (1942). See also: *Baltzell v. Church Home*, 110 Md. 244 (1909); *Mt. St. Mary's College v. Williams*, 132 Md. 184 (1918); *Colbert v. Speer*, 24 App. Cas. (D.C.) 187; affirmed 200 U.S. 130 (1906), upholding a private gift to Georgetown College.

Introduction to Main Question

Before discussing the primary question as to whether these appropriations establish or prohibit religion, I wish to make several observations.

First, it is now firmly established that the First Amendment's mandate that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, * * *" has been made wholly applicable to the states by the Fourteenth Amendment."[2]

In 1947, the Supreme Court of the United States set forth in the *Everson* case[3] the minimum scope or meaning of the Establishment Clause of the First Amendment as follows:

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a

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[2] *Abington School District v. Schempp*, 374 U.S. 203, at 215, 10 L. Ed. 2d 844 (1963).

[3] *Everson v. Bd. of Ed.*, 330 U.S. 1 (1947).

belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.' "

A purpose of the Establishment of the Religion Clause of this Amendment was based upon the awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand and the belief that the union of government and religion tends to destroy government and degrade religion.[4]

The generally recognized and approved neutrality position of the government over religion requires the government to be neutral not only between sects but in a larger sense between believers and non-believers.

While a government grant to build a church or conduct a theological seminary is void, there is no prohibition against teaching factually and objectively about religion as contrasted to teaching religion.

The proper answer to the question is not only legal but philosophical as the Amendment reflects the philosophy that church and state should be separate.[5] In addition to the numerous opinions, countless books and articles have been written on the question.[6]

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[4] *Engel v. Vitale,* 370 U.S. 421, 8 L. Ed. 2d 601.

[5] *Zorach v. Clauson,* 343 U.S. 306, 96 L. Ed. 954.

[6] See, for example, Oaks, *The Wall Between Church and State* (1963); Katz, *Religion and American Constitution* (1963); Pfeffer, *Creeds and Competition* (1958); Stoke and Pfeffer, *Church and State in the United States* (1964); Giannella, *Religion and the Public Order* (1964).

Finally, I heartily agree with Professor Kurland when he said: "Anyone suggesting that the answer * * * is clear one way or the other is either deluded or deluding."[1]

MAIN QUESTION

Does the First Amendment to the United States Constitution Prohibit the within Grants to Church Connected Colleges?

As previously stated, we are concerned with the Establishment Clause of this Amendment entitled "Freedom of Religion" and providing, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *."

The test which I find to be most apposite in considering the above Clause is found in the recent "School Prayer" case, where Mr. Justice Clark, speaking for the majority of the Supreme Court, said:

> "The test may be stated as follows: What are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." (374 U.S. 203).

Let us now consider the relevant decisions of the Supreme Court. The cases are complex because they involve not only technical aspects of law but political philosophies of government. While our controversy relates as previously stated to the Establishment Clause of the Amendment, I find that in many of the cases it has been necessary for the Court to also interpret the latter clause of the Amendment, guaranteeing religious freedom, and that in several instances the two clauses overlap.

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[1] *Senate Document No. 29, 87th Congress,* 1st Session. Katz, *Religion and American Constitution,* p. 73.

One of the first cases to come before the Supreme Court bearing on the issue of religious freedom was *Reynolds v. U. S.*, 98 U.S. 145, 25 L. Ed. 244 (1878). Here a Mormon had been convicted of bigamy. On appeal he contended that the conviction was a violation of religious freedom guaranteed by the First Amendment. The Supreme Court rejected this contention and held that the government was free to reach actions which were in violation of social duties or subversive of good order. The importance of this opinion in the development of judicial interpretation of the First Amendment lies in the precedent the Court established by which to interpret the wording of the Amendment. Lacking case precedent, the Court turned to history and stated: "The word religion is not defined in the Constitution. We must go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was adopted."

Bradfield v. Roberts came before the Supreme Court in 1899 and is reported in 175 U.S. 291. This case involved a federal appropriation of $30,000. for the erection of hospital buildings operated by Catholic Nuns in the District of Columbia. It was contended that the appropriation was illegal because the sums would be used for the support of religious societies and therefore contrary to the First Amendment. The Court overruled this contention stating that the hospital was a legal entity, chartered by Congress and the fact that the individuals who comprised the corporation happened to be all members of one religious organization or none is of no consequence; further, that the hospital must be operated in accordance with its charter as a secular corporation, whose purpose it is to cure the sick of all faiths.

It was not until 1947 when the Supreme Court decided the famous parochial school bus case of *Everson v. Board of Education.*[8] In this case, the Court upheld the right of New Jersey to finance bus transportation of children to parochial as well as public schools. Briefly, the Court held that the act protected the children from traffic accidents

[8] 330 U.S. 1, 91 L. Ed. 711.

similarly to the employment of traffic policemen near school buildings. While this was a 5 to 4 decision on the main issue, the Court was unanimous regarding the meaning of the First Amendment and the reason for its creation. The Court differed on the question of application. It appears that the majority of the Court felt invalidating the statute would amount to interference with the freedom of religion.

Heretofore in this Opinion I set forth the meaning attributed by the Court to this Amendment. It appears therefore that the Supreme Court approved the earlier *Wheat* decision of the Maryland Court of Appeals. Continuing the Opinion for the majority, Mr. Justice Black said: "The First Amendment has erected a wall between Church and State. That wall must be kept high and impregnable. We should not approve the slightest breach. New Jersey has not breached it here."

A weakness appears today in this Supreme Court Opinion. Mr. Justice Douglas, who made up the bare majority of the Court, went out of his way to say in his Regents Prayer Opinion in June of 1962: "The Everson case seems in retrospect to be out of line with the First Amendment".[9]

In 1948, or a year after the *Everson* decision, the Supreme Court decided *McCollum v. Board of Education,* 333 U.S. 203, 91 L. Ed. 649. In this case, the School Board of Champaign, Illinois provided for religious teachers to come into the public school buildings and during school hours teach a 30 minute religious course. The Court held this unconstitutional, holding that a state cannot utilize its public school facilities to aid any or all religious faiths or sects in the dissemination of their doctrines.

In a series of subsequent cases, the Supreme Court reaffirmed its holding that the meaning of the First Amendment was to maintain a separation of Church and State and that the government therefore must maintain a neutral position in regards to religion.[10]

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[9] *Engel v. Vitale,* 370 U.S. 421, 433 (1962).

[10] *Zorach v. Clauson,* 343 U.S. 306, 96 L. Ed. 954 (1952); *McGowan v. Md.,* 366 U.S. 420, 6 L. Ed. 2d 393 (1961); *Torcaso v. Watkins,* 367 U.S. 488, 6 L. Ed. 2d 982 (1961).

It is in the light of these legal theories that the famous "School Prayer" decision of 1962 was reached. Although this case, *Engel v. Vitale,* creates a great amount of emotional outcry, the decision appears to be the only logical result that could have been reached. In this case, the Board of Regents of a New York State School District made up a simple non-sectarian school prayer and recommended it be recited by each class of students at the beginning of the school day. The Supreme Court ruled this action unconstitutional in violation of the Amendment, holding that in this country it is not part of the business of government to compose official prayers for any group of the American people.

Finally, in the case of *Abington School District v. Schempp,* to which was joined the Maryland case of *Murray v. Curlett,* 374 U.S. 203, 10 L. Ed. 2d 844 (1963), the Supreme Court reviewed all its previous decisions and held that the required reading from the Bible and recitation of the Lord's Prayer was a violation of the First Amendment. Mr. Justice Clark, speaking for an almost unanimous Court, said: "The Establishment Clause has been directly considered by this Court eight times in the past score of years and, with only one Judge dissenting on the point, it has consistently held that the clause withdrew all legislative power respecting religious belief or the expression thereof." The Court then sets forth the test which I have adopted and set forth on page 14 of this Opinion. Continuing, the Court said:

> "The place of religion in our society, is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard. In the relationship between man and religion, the State is firmly committed to a position of neutrality."

The Court, after stating the above rules, said that its application "requires interpretation of a delicate sort", which is of course true in most difficult cases. It must be admitted that regardless of the established law of separation of religion and government that this has never been completely accomplished and would be practically impossible. Government programs providing milk, school lunches and medical inspections are given to both religious and public schools. Our Government erects chapels and employs chaplains serving our Military, Naval and Air Academies where religious attendance is compulsory. The inscription "In God We Trust" appears on our coins, our dollar bill and on some of our postage stamps. The Holloway Plan, designed to obtain a needed supply of Naval Officers, has established units at Church related colleges, such as Notre Dame University. Veterans are even permitted to attend theological seminaries under the G. I. Bill of Rights. The sessions of Congress and State Legislature are invariably opened with prayer, in Congress by chaplains who are employed by the Federal Government. We have chaplains in the Armed Forces and in our penal institutions. Oaths in court are administered through the use of the Bible. Public officials take an oath ending with "so help me God". Religious institutions are tax-exempt throughout the Nation, and the Supreme Court itself is opened with the supplication "God save the United States and this Honorable Court".

To me, the test laid down by the Supreme Court in the "Prayer" case means that if either the legislative purpose or the primary effect of the enactment advances or suppresses religion, the legislation is invalid, otherwise, it is valid.

As to the legislative purpose, it seems crystal clear that the Maryland Legislature was in no way concerned with religion in making the appropriation because (a) the language of the Acts themselves show that the grants were intended for science buildings, dormitories, dining halls and classroom buildings, all of a secular nature; (b) members of the legislature are presumed to know that the

grants, if for a sectarian nature, would be invalid; (c) that the Maryland Legislature for the past 175 years has made similar grants to private colleges and universities, including many denominational institutions.[11]

I now reach the difficult question in the case, namely, Is the Primary Effect of One or More of These Enactments To Advance Religion?

In the appropriation to Hood College and Western Maryland College, the answer is clearly "no". The grants to these Colleges are for the construction of secular college buildings in no way connected with religion. Neither College trains for the ministry or other religious work and the faculty and students of both Institutions are selected without regard to any religious affiliation. It is interesting to note that Hood, although connected with the United Church of Christ, has a student body of 146 Episcopalians and 108 Presbyterians as compared to 89 students affiliated with the United Church, in addition to other students of many denominations.

As to Hood, the only religious connection appears to be a United Church Chaplain and 7 United Church Trustees in a Board of 30 members. Two semester hours out of 124 are required in an objective study of the Bible and some attempt is made to require the students to attend 14 evening services in the Chapel and 7 Sunday services also in the Chapel per semester, less 6 cuts permitted for both. At the services, ordained Ministers of various denominations act as speakers.

Western Maryland College, associated with the Methodist Church is but slightly different from Hood except that the student body is approximately 40 percent Methodist. Its governing body numbers 40 of whom one more than one-third are required to be Methodist Ministers. Three semester hours in Biblical literature out of a total of 128 are required for graduation. During each semester, 10

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[11] See Grants enumerated in *Johns Hopkins University v. Williams*, 199 Md. 382, pp. 399-400; *Board v. Williams*, 174 Md. 314, at pp. 335-337.

chapel services, 7 lecture assemblies and 3 evening concerts are scheduled. Of these 20 events, students are required to attend 13. From the above, I must conclude that the primary effect of these two enactments is secular and that their effect on religion is most subordinate and incidental.

The grants to Notre Dame and St. Joseph's may also be considered together, but present a much more difficult question. In the case of both of these Institutions, the appropriations are for the construction of science buildings. The testimony establishes that there will be no religious services conducted in either of these buildings.

In considering the validity of the enactments, a distinction can be made between young adults of college age whose attendance is voluntary, and a child in elementary school where attendance is compulsory. Thus, in *Hamilton v. Regents*, 293 U.S. 245 (1934) the Court held that a student who voluntarily attended a state university where military training was required, had no ground to complain when he was not excused because of his religious scruples. On the other hand, in *Board of Education v. Barnette*, 319 U.S. 624 (1943) a student in a grade school was held to be entitled to be excused from saluting the flag on a showing that this practice was contrary to his religious beliefs. Therefore, it follows that a college student is usually mature enough to have made the decision to attend college and to select the institution best suited to his career objectives. At some sectarian institutions he is not required to study religion but if he chooses an institution where religious instruction is mandatory, he is merely asserting his constitutional right to the freedom of religion.

It has been suggested that many factors should be considered in determining whether particular colleges are religious educational colleges. Some of these factors are: (1) stated purpose of the college; (2) college personnel; (3) college's relation to religious organizations; (4) place of religion in the college program; (5) the result and outcome of the college program. I agree that these are proper factors in determining the degree that the institutions

are connected with religion, but this is not the real issue and it has been conceded from the beginning that all of the four Colleges are both church related and denominational. The issue is whether the primary effect of providing the means for the construction of secular buildings at these Institutions advances religion.

If the grants were for the construction of a church or chapel at any of the Institutions, the answer would clearly be in the affirmative. I must also admit that if I accept some of the exhibits and publications of these two Catholic Institutions literally or at face value that I would be inclined to hold that the receipt of these grants would advance religion to a substantial degree. Some of these publications are, for example, (1st) a chart of Notre Dame dated November, 1959, showing that the core or center of all education at that Institution is philosophy and theology from which branches all secular subjects, such as science and mathematics; (2nd) statements appearing in the catalogue of both Colleges to the effect that the Institutions are for the education of Catholics only and (3rd) the general statements in the publications to the effect that religion is primary, permeating all study, thereby making education secondary.

While the above may have been the objectives and the desire of many of the devout founders and leaders of these Institutions, I do not find that they exist at this time. Even the stated objectives of the Institutions in their charters must give way to the situation as actually existing. The buildings sought to be constructed are for secular purposes and the testimony in this case clearly establishes that the secular courses, such as science, English and mathematics, taught in these Institutions are practically identical with the courses at non-religious colleges.

Most everyone acknowledges that Roman Catholics are more rigid in their doctrinal views (which are currently being diminished) than most Protestant religions and therefore there are more religious requirements and greater religious atmosphere at these two Institutions than

the others. However, non-Catholic students and faculty are freely admitted to both Institutions, and no attempt is made to convert non-Catholic students and faculty or to interfere with the free exercise of their religion. If we distinguish between church related colleges on the basis of the degree of their relationship to a particular denomination, we would discriminate between different religions which is likewise prohibited by the First Amendment.

There is another point which I feel should be discussed in this case. The Plaintiffs concede that public grants to religious institutions, such as hospitals, orphan asylums and other non-educational institutions are valid when affecting health, safety and welfare of our citizens. While the circumstances and historical knowledge of the framers and the electors during the proposal and ratification of this Amendment between 1789 and 1791 are pertinent, it appears more important that I determine the current legislative purpose and effect of the enactments in question, especially with reference to public welfare.

It was not until World War I and, perhaps, as late as World War II that higher education, especially in the sciences, became necessary in preserving the safety of our Nation. For example, in World War I the uneducated but deadly rifleman, Sgt. York was worth a dozen college graduates. During World War II, with the creation of the atomic bomb and other numerous scientific inventions, the higher education of our citizens became paramount. As President Truman announced, our Nation's monopoly of the atom hydrogen bomb ended in 1949. Since that date, our knowledge of the sciences has become more important.

Most of us know that the Government maintains Military, Naval and Air Academies, but that it lacks a science academy. All of our scientists, therefore, must come from the public and private institutions of higher learning. According to the testimony in this case, there are a total of approximately 1189 private institutions of higher learning in the United States and of this total, 817 are church related. Our source for obtaining scientists would be very limited if confined to the small number of non-religious institutions.

Article 43 of the Maryland Declaration of Rights impresses upon the legislature the necessity of exercising for the public good the various powers which it possesses. It would therefore seem to me that the scientific education of college students is most vital to our public safety and welfare, perhaps more so than training juveniles at St. Mary's Industrial School, even though it did produce Babe Ruth.[12]

The conclusion which the Court has reached herein does not differ from a statement by Plaintiff's Senior Counsel, Mr. Pfeffer, wherein he wrote:

> "When the Everson decision is coupled with the Cochran decision, they lead logically to the conclusion that a state may, notwithstanding the First Amendment, finance practically every aspect of parochial education, with the exception of such comparatively minor items as the proportionate salaries of teachers while they teach the cathechism."[13]

For the above reasons, I find that all the appropriations are valid and constitutional, necessitating the dismissal of the Bill of Complaint with costs.

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[12] While the facts are not directly in point, the following language of Chief Judge Phillips is to some degree relevant: "Freedom of religion * * * guaranteed by the First Amendment, with respect to acts and utterances calculated to interfere with the power of Congress to provide for the common defense and to insure the survival of the nation are qualified freedoms. They may not be construed so as to prevent legislation necessary for national security, indeed, that may be necessary to our survival as a nation." *Warren v. U. S.*, 177 F. 2d 596, at p. 599, C.C.A. 10th (1949).

[13] Pfeffer, *Church, State and Freedom*, p. 476 (1953) quoted in Oaks, *The Wall Between Church and State*, p. 60.

APPENDIX C

FEDERAL PROGRAMS IN WHICH DENOMINATIONAL SCHOOLS AND COLLEGES MAY PARTICIPATE

DEPARTMENT OF AGRICULTURE

Commodity Distribution Program. (Agricultural Adjustment Act of 1949; 63 Stat. 670; 7 U.S.C. 1301). Any public or nonprofit private school or charitable institution serving needy persons is eligible for food commodities.

Cooperative Agricultural and Forestry Research Program. (76 Stat. 806; 16 U.S.C. 582a-582a-7). Makes research funds available to designated research institutions. There is no stated exception as to church-related institutions receiving such funds.

Forestry Research. (Forest Products Act; P.L. 85-934; 72 Stat. 1793; 16 U.S.C. 581). Provides grants for forestry research to universities and private research institutions.

National School Lunch Program. (National School Lunch Act; P.L. 87-823; 79 Stat. 944; 42 U.S.C. 1751 et seq.). Secretary of Agriculture makes funds available to States for distribution to public or private schools or makes funds available directly to church-related schools.

Special Milk Program for Children. (National School Lunch Act; P.L. 87-823; 79 Stat. 944; 42 U.S.C. 1751 et seq.). Funds of Commodity Credit Corp. are used to provide milk to private elementary and secondary schools.

Use of National Forests. (30 Stat. 36; 16 U.S.C. 479). Authorizes occupancy of 2 acres of national forest land for the erection of a school; no proscription exists as per church-related schools.

DEPARTMENT OF COMMERCE

Research and Development Programs. Grants and contracts for research and development, together with

research facilities, are made with educational institutions both public and private.

DEPARTMENT OF DEFENSE

Reserve Officer Training Programs. (39 Stat. 191; 10 U.S.C. 4382 (1916)). Authorizes the President to establish and maintain in civil educational institutions a training program leading to a commission in the armed forces. Payments are made to the institution in support and maintenance of such programs.

Training and Research Programs. (72 Stat. 1793; 42 U.S.C. 1891-1893 (1958)). Provides for research and training contracts *or* grants to be made with nonprofit institutions of higher learning both public and private. The Department of Defense has a number of training and research programs which finance activities at institutions of higher education. Research contracts fall under the procurement authority of each of the three branches of the Armed Forces. Thus, research is supported because of benefits to be received by the Defense Department and training is paid for because it improves the qualifications of military and civilian personnel. Such arrangements have also been made on a grant basis to institutions pursuant to 42 U.S.C. 1891-1893, which specifies that the authority to contract for certain scientific research at nonprofit institutions of higher education shall be deemed to be authority to make grants.

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE

Adult Basic Education. (P.L. 89-253; 78 Stat. 520; 42 U.S.C. 2801-2822). Authorizes O.E.O. to contract with or make grants to private colleges for training of teachers of illiterates.

Advanced Training of Nursing Teachers and Supervisors. (Public Health Service Act. Sec. 307; P.L. 86-105; 73 Stat. 239; 42 U.S.C. 242(E)). Provides for the award of traineeships by grants to educational institutions for

the training of nurses for supervisory or teaching positions.

Cancer and Chronic Disease Control Grants. (P.L. 88-136; 62 Stat. 469; 42 U.S.C. 282, 283). Provides grants to institutions of higher education for training programs in cancer control, prevention, and eradication.

Child Welfare Research, Training and Demonstration Projects. (Social Security Amendments of 1960; P.L. 86-778; 74 Stat. 997; 42 U.S. C. 726 (1964) as amended). Provides grants to nonprofit institutions of higher learning for special projects in the field of child welfare. No proscription exists with respect to institutions with religious affiliations.

Chronic Diseases and Health Problems of the Aged. (Public Health Service Act, Sec. 301; P.L. 78-410; 58 Stat. 691; 42 U.S.C. 241 (1964), as amended). Grants to nonprofit health agencies and universities for research in the field of health problems of the aged are authorized.

Clean Air Control. (P.L. 88-206; 77 Stat. 392; 42 U.S.C. 1857). Authorizes grants to private educational institutions for research and surveys in air pollution.

College Library Resources. (Part A, Title II, Higher Education Act of 1965; P.L. 89-329; 79 Stat. 1224; 20 U.S.C. 1021-1028). Provides grants for acquisition of library resources to *any* accredited institution of higher education.

Cooperative Research Program. (Elementary and Secondary Education Act of 1965, Title IV; P.L. 89-10; 79 Stat. 44; 20 U.S.C. 331-332B (1965)). Authorizes grants and contracts to public and private universities and colleges for research, surveys and demonstrations in the field of education.

Crippled Children's Services. (Maternal and Child Health and Mental Retardation Planning Amendments of 1963, Secs. 3 and 4; P.L. 88-156; 77 Stat. 273; 42 U.S.C. 711-715 (Supp. V)). Provides for special grants to public and private institutions of higher learning for projects that

contribute to the advancement of services for crippled children.

Education Advisory Services and Data. (Enabling Law of the Office of Education, 1867; U.S.C., Title 20—Education). Provides advisory services and publications to any school, college or university to aid in improving educational practices, methods of financing, construction of facilities, etc.

Education of Children of Low Income Families. (Elementary and Secondary Act of 1965; P.L. 89-10; as amended by P.L. 89-313). Provides grants to States for distribution to local agencies for expanding and improving educational programs for public *and* non-public school children.

Educational Opportunity Grants. (Part B, Title IV, Higher Education Act of 1965; P.L. 89-329; 79 Stat. 1232; 20 U.S.C. 1061-1069). Grants to deserving students to attend the institution of higher education of his choice are authorized.

Environmental Engineering and Food Protection. (Public Health Service Act, Sec. 301, as amended; P.L. 87-838; 76 Stat. 1073; 42 U.S.C. 241 (1964), as amended). Provides grants to colleges and universities for support of specified research projects.

Equal Education Opportunities Programs. (P.L. 88-352; 78 Stat. 246). Federal grants may be made to private institutions of higher education to operate programs dealing with desegregation in education.

Equipment to Improve Undergraduate Instruction. (Part A, Title VI, Higher Education Act of 1965; P.L. 89-329; 79 Stat. 1261; 20 U.S.C. 1121). Authorizes grants to pay part of the cost of laboratory, classroom or library equipment for the teaching of secular subjects to *all* institutions of higher education.

Faculty Development Programs. (Part B, Title VI, Higher Education Act of 1965; P.L. 89-329; 79 Stat. 1266; 20 U.S.C. 1131). Provides grants or contracts to *all* insti-

tutions of higher education for the operation of workshops, institutes, and programs for teachers in higher education.

Fellowships for Teachers. (Part C, Title V, Higher Education Act of 1965; P.L. 89-329; 79 Stat. 1258; 20 U.S.C. 1111). Provides for fellowships for graduate study leading to a masters degree to teachers or recent graduates wishing to enter the profession.

Grants for College Work—Study Program. (Economic Opportunity Act of 1964, Title I; P.L. 88-452, 78 Stat. 513; 42 U.S.C. 2751-2756 (1964). Part C, Title IV, Higher Education Act of 1965). Provides grants to public or private nonprofit institutions of higher education to help them to assist students stay in school by providing part-time employment.

Guidance, Counseling, and Testing. (National Defense Education Act, Title II A and B; P.L. 88-210; P.L. 88-665; 72 Stat. 1592; 20 U.S.C. 481-484). Grants may be provided to the States or directly to private, church-related schools for the guidance, counseling and testing of elementary and secondary school children.

Health Professions Educational Assistance. (Title VII, Public Health Service Act, as amended; P.L. 89-290; 79 Stat. 1056-1058; 42 U.S.C. 292-295(e)). Provides funds for the construction or renovation of medical teaching facilities as well as student loans and scholarships for students of health professions.

Health Research Facilities. (Public Health Service Act; P.L. 89-115; 79 Stat. 448; 42 U.S.C. 292). Authorizes grants to institutions of higher education for construction of medical research facilities.

Health Research Project Grants. (Public Health Service Act; P.L. 87-838; 76 Stat. 1073; 42 U.S.C. 241D). Provides grants to defray costs of research in physical and mental illness and in water and air pollution to institutions of higher education.

Higher Education Facilities Construction Grants. (Title VII, Sec. 701A, Higher Education Act of 1965, amending Sec. 106 of Higher Education Facilities Act of 1963; P.L. 89-329; 79 Stat. 1267; 20 U.S.C. 701-733). Provides grants to institutions of higher education for construction of graduate and undergraduate academic facilities for research and instruction in the sciences, languages, and for libraries.

Higher Education Facilities Construction Loans. (Title III, Higher Education Facilities Act of 1963; P.L. 88-204, 77 Stat. 372; 20 U.S.C. 741). Provides loans for up to 75 percent of the cost of construction of academic facilities in institutions of higher education.

Hospital Construction and Renovation. (Public Health Service Act; P.L. 88-581; 78 Stat. 919; 42 U.S.C. 291). Provides grants to colleges or universities for construction or renovation of hospital facilities.

Institutes for Teachers of Disadvantaged Youth. (National Defense Education Act, as amended; P.L. 88-665, Title IX; P.L. 85-864; 78 Stat. 1107; 20 U.S.C. 15AAA-15GGG). Provides funds to institutions of higher education to operate institutes of advanced study for teachers of disadvantaged youth.

Juvenile Delinquency and Youth Development. (P.L. 88-368; 78 Stat. 309; 42 U.S.C. 2542-2544). Authorizes grants to institutions for projects, training and research in the prevention and control of juvenile delinquency.

Language and Area Centers. (National Defense Education Act; P.L. 88-665; 78 Stat. 1106; 20 U.S.C. 511a). Authorizes contracts with institutions of higher education to establish foreign language teaching centers.

Language Fellowships. (National Defense Education Act; P.L. 88-665; 78 Stat. 1106; 20 U.S.C. 511B). Provides payments to students to meet costs of training in selected modern foreign languages.

Language Research. (National Defense Education Act; P.L. 85-864; 72 Stat. 1594; 20 U.S.C. 512). Authorizes con-

tracts with institutions of higher education for studies and surveys in instruction in foreign languages.

Language Institute Programs. (National Defense Education Act; P.L. 87-344; 75 Stat. 760; 20 U.S.C. 491, 521). Authorizes contracting with institutions of higher education for programs to improve qualifications of foreign language teachers. A similar provision covers institutions for academic counselors in elementary and secondary schools.

Library Training and Research. (Part B, Title II, Higher Education Act of 1965; P.L. 89-329; 79 Stat. 1227, 1228; 20 U.S.C. 1031-1034). Provides grants to institutes of higher education for the teaching of library science.

Loans to Nonprofit Private Schools. (National Defense Education Act; P.L. 85-864; 78 Stat. 1104; 20 U.S.C. 445). Provides for grants to State educational supervisory services for the acquisition of science, mathematics and foreign language equipment. A percentage of these funds must be alloted for loans to private, nonprofit elementary and secondary schools for the acquisition of such equipment. Affiliation of such schools with a religion is immaterial.

Loans to Students in Institutions of Higher Education. (National Defense Student Loan Program). (National Defense Education Act, Title II, amendments 1964; P.L. 88-665; 78 Stat. 1100-1102; 20 U.S.C. 421-429 (1964)). Provides loan funds to *any* eligible college or university (including church-related institutions) to make low interest loans to needy students.

Low Interest Loans to Students in Institutions of Higher Education. (Part B, Title IV, Higher Education Act of 1965; P.L. 89-329; 79 Stat. 1236; 20 U.S.C. 1071). Provides loan insurance to students enrolled in a public or non-profit private institution of higher education on a half-time or full-time schedule.

Maternal and Child Health Services. (Maternal and Child Health and Mental Retardation Amendments of 1963; P.L. 88-156; 77 Stat. 273; 42 U.S.C. 701). Authorizes

special project grants to extend and improve maternal and child health services to nonprofit institutions of higher education.

Medical Library Assistance. (Title III, Public Health Service Act, as amended; P.L. 89-291; 79 Stat. 1067; 42 U.S.C. 280A-280B). Provides grants for the construction, expansion or renovation of medical library facilities to public and private institutions of higher education.

Medical Research Grants. (Public Health Service Act; P.L. 87-838; 76 Stat. 1073; 42 U.S.C. 241). Authorizes research grants to public and private institutions of higher education.

Mental Health-Research and Training. (Public Health Service Act; 70 Stat. 929, 930; 42 U.S.C. 242(A)(B)). Colleges and universities are eligible for grants for research and training in the field of mental health.

Mental Retardation — University Affiliated Clinical Facilities. (Mental Retardation Facilities Construction Act of 1963; P.L. 88-164; Titles I, IV; 77 Stat. 282; 42 U.S.C. 291K). Provides project grants to college and university hospitals for the construction of mental health clinical facilities.

National Defense Fellowships. (National Defense Education Act; P.L. 88-665; 78 Stat. 1105; 20 U.S.C. 464). Provides funds to institutions of higher education for the award of graduate fellowships.

Nursing School Construction: (Nurse Training Act of 1964; P.L. 88-581; 78 Stat. 908; 42 U.S.C. 296). Construction grants for nursing school facilities are authorized.

Nurse Training. (Title VIII, Public Health Service Act as amended; P.L. 88-581; 78 Stat. 908-918; 42 U.S.C. 296, 297). Provides grants to public and private nonprofit schools of nursing for student loans, nursing training programs, and construction of training facilities.

Preparation of Professional Personnel for the Education of Handicapped Children. (Mental Retardation Facili-

ties and Community Mental Health Centers Construction Act of 1963; P.L. 88-164; 77 Stat. 294; 20 U.S.C. 611-618 (Supp. V) 1963). Provides grants to public and nonprofit colleges and universities for expansion in the education of handicapped children.

Preschool and School Child Health. (1965 Amendments to Social Security Act; P.L. 89-97; 79 Stat. 286; 42 U.S.C. 729). Authorizes grants to private schools of medicine and teaching for health care and services to children.

Public Health Training — Traineeships. (Graduate Public Health Training Amendments of 1964; P.L. 88-497; 78 Stat. 613; 42 U.S.C. 242D (1964)). Provides grants to be used as tuition, fees, and allowances by students and institutions for public health training.

Project Grants for Graduate Training in Public Health. (Public Health Service Act, Sec. 309; P.L. 88-497; 78 Stat. 613; 42 U.S.C. 242(g)). Provides project grants for graduate training in public health to educational institutions.

Regional Medical Programs. (Heart Disease, Cancer, and Stroke Amendments of 1965; P.L. 89-239; 79 Stat. 926; 42 U.S.C. 299). Grants are available to nonprofit colleges and universities for the operation of regional medical programs of research and training.

Research in Maternal, Crippled Children and Child Health Services. (Maternal and Child Health and Mental Retardation Planning Amendments of 1963; P.L. 88-156; 77 Stat. 274; 42 U.S.C. 729 (1964)). Provides grants to public and nonprofit institutions of higher learning for the improvement of services in the field of maternal and child health services.

Research and Experimentation in Mass Medias. (National Defense Education Act; P.L. 85-864; 72 Stat. 1595; 20 U.S.C. 542). Provides for grants or contracts for research, experimentation, and dissemination of information by institutions of higher education in the field of communications media for educational purposes.

Research Fellowship Grants and Awards. (Public Health Service Act, Secs. 301(G), 433(A); P.L. 87-838; 76 Stat. 1073; 42 U.S.C. 241(c), 289(c)). Provides funds for the award of fellowships in health research or training either to the individual or directly to the educational institution.

School Library Resources, Textbooks, and Other Instructional Materials. (Elementary and Secondary Education Act of 1965; P.L. 89-10; 79 Stat. 36; 20 U.S.C. 821-827). Provides grants to States for acquisition of library and instructional materials which shall be made available to public and private elementary and secondary schools for the teaching of secular subjects.

Strengthening Developing Institutions. (Title III, Higher Education Act of 1965; P.L. 89-329; 79 Stat. 1229-1230; 20 U.S.C. 1051-1055). A program to assist accredited small colleges and universities in raising their academic qualities. No proscription exists in regard to church-related institutions of higher education.

Student Assistance for College Work-Study Program. (Economic Opportunity Act of 1964; P.L. 88-452; 78 Stat. 513; 42 U.S.C. 2751-2756 (1964)). Provides part-time employment to students in institutions of higher learning who need employment to pursue courses of study.

Vocational Education Research Grants. (Vocational Education Act of 1963; P.L. 88-210; 77 Stat. 403; 20 U.S.C. 15AA, 15BB, 15AAA, 35-35N (Supp. V)). Provides grants to colleges, universities or other public or nonprofit institutions for research and training in vocational education.

Vocational Rehabilitation — Research, Training, and Demonstration. (Vocational Rehabilitation Act of 1920; P.L. 66-236; 41 Stat. 735; 29 U.S.C. 31-41 (1964), as amended). Provides grants to public and nonprofit private educational institutions in support of research and training projects, facilities, and centers in the field of rehabilitative medicine.

ATOMIC ENERGY COMMISSION

(Atomic Energy Act of 1946; (P.L. 585) as amended, Secs. 3(A), 5(c)(2); 70 Stat. 1069; 42 U.S.C. 2051, 2111). Commission operates a variety of programs under which support is given for activities in institutions of higher education. These programs are grouped as follows:

Equipment, materials and services

Grants and loans of laboratory equipment, research reactors, and teaching aids are made to institutions.

Research and development programs

Grants or contracts are made with institutions of higher education for research and construction of research facilities in fields involving atomic energy.

Student fellowships

Payments are made to individuals to cover tuition and subsistence for study in nuclear science and engineering and for graduate work in the atomic energy aspects of the life sciences.

Training programs

Summer institutes for teachers and other training programs are offered in various fields relating to atomic energy.

HOUSING AND HOME FINANCE AGENCY

College Housing Program. (Housing Act of 1950; P.L. 81-475; 64 Stat. 77; 12 U.S.C. 1749). Provides long-term loans for construction of housing and other service facilities for students and faculty to institutions of higher education.

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

University Research Program. (National Aeronautics and Space Act of 1958; P.L. 85-568, sec. 203(b)(5); 72 Stat. 429; 42 U.S.C. 2473(b)(5)). Research is conducted through contract with institutions of higher

education in matters within the scope of interest of the National Aeronautics and Space Administration. The agency has also made grants to institutions with religious affiliation pursuant to the provision of 42 U.S.C. 1891-93, which provides that authority to contract with institutions of higher education for certain types of research shall also include the authority to make grants.

NATIONAL SCIENCE FOUNDATION

(National Science Foundation Act of 1950 (P.L. 507, 81st Cong.), secs. 3(a)(2), (3), (4) and (b), 11(c) and 14, as amended by P.L. 85-510, sec. 2, and P.L. 86-232, sec. 1; 42 U.S.C. 1862 (a), (2), (3), (4), and (b), 1870(c) and 1872a(b)). Pursuant to broad statutory authorizations to foster research and education in scientific fields, the National Science Foundation provides the following support for activities in institutions of higher education:

1. Fellowships for various types of graduate studies include allowance for tuition and subsistence and permit study at any accredited nonprofit institution of higher education in the United States or abroad.

2. Summer, academic year and inservice institutes are financed at institutions of higher education through stipend and tuition payments to improve the qualifications of high school and college teachers in science and mathematics. Stipends are paid without regard to the fact that the teacher is from a school with religious affiliation.

3. Special projects in science education are financed to provide the experimental testing and development of promising new ideas for the improvement of science instruction.

4. Programs are financed to improve course content and supplementary teaching aids in science.

5. Grants are made for basic research in the sciences, including funds for the use of graduate students as research assistants.

VETERANS' ADMINISTRATION

Vocational Rehabilitation. (Veterans' benefits (P.L. 85-857), ch. 31, secs. 1503, 1504; 72 Stat. 1171; 38 U.S.C. 1503, 1504). Training is purchased from educational institutions of all types, including those with sectarian affiliation, for the rehabilitation of war veterans with service connected disabilities. In addition, a subsistence allowance is paid the veteran.

Educational Benefits for World War II and Korean Veterans. (Veterans' benefits (P.L. 85-857), ch. 33, sec. 1601 et seq.; 72 Stat. 1174; 38 U.S.C. 1601 et seq.). Educational benefits for veterans of World War II were included in P.L. 346, 78th Congress. Under the original arrangement, tuition payment was made directly to the school which the veteran attended, and this could include a theological school. In addition, a subsistence payment was made to the veteran. The arrangement for payment of tuition directly to the school was changed by P.L. 550, 82d Congress, which authorized a payment to the veteran and left it to him to take care of any tuition charges. The program for World War II veterans ended in July, 1956, except for a small number of persons who are entitled to training benefits beyond that date. A present program authorized by P.L. 85-857 provides for an education and training allowance directly to the veteran.

War Orphans, Educational Assistance. (Veterans' benefits (P.L. 85-857), ch. 35, secs. 1701 et seq.; 72 Stat. 1193; 38 U.S.C. 1701 et seq.). This program provides educational opportunities for children of wartime veterans who died from a service-incurred disease or injury. The student must be pursuing an approved program of education in an institution of higher education or in a vocational school below the college level. Payments are made directly to the student to meet in part the expense of his tuition and subsistence. The Veterans' Administration is required to pay each educational institution $1 per month for each eligible person enrolled to assist in defraying the cost of preparing and submitting reports (38 U.S.C. 1765).

G.I. Bill of 1966. (Veterans Readjustment Benefits Act of 1966; P.L. 89-358; 80 Stat. 12; 38 U.S.C. 1651). Extends the benefits of higher education to eligible veterans through direct payments to the veteran. The veteran may choose either a sectarian or nonsectarian institution of higher education.

SMALL BUSINESS ADMINISTRATION

Business Management Research. (Small Business Investment Act of 1958; P.L. 85-699; 72 Stat. 698; 15 U.S.C. 636(d)). Provides for grants for research and development in the field of business management and finance to colleges and universities including church-related institutions.

MISCELLANEOUS PROGRAMS

Educational Costs of Congressional and Supreme Court Pages. (60 Stat. 839; 2 U.S.C. 88(a)(c). Provides for payments to private or parochial schools for the education of pages.

APPENDIX D

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Pfeffer, "A Momentous Year in Church and State: 1963," 6 *J. of Church and State* 36 (1964). An interpretive analysis of the meaning and significance of 1963 for American church-state relations. Finds in the inclusion of sectarian institutions in the 1963 Higher Education Act an issue which must inevitably be passed on by the Supreme Court.

"Professors Oppose Aid to Church Colleges," 79 *Christian Cent.* 617 (May, 1962). A report of the opposition of the A.A.U.P. to the use of federal funds, whether in the form of grants, gifts, or loans, to church-related colleges or universities.

Rafalko, "Federal Aid to Private School Controversy: A Look," 3 *Duquesne Univ. L. Rev.* 211 (1965). A study of the history and current interpretation of the establishment clause with particular emphasis upon present forms of federal aid to private schools and colleges.

Reed, "The 'Permeation' Issue in Federal Aid to Education," 8 *Catholic Law.* 197 (1962). Concludes that if

educational legislation satisfies a public purpose then any "aid to religion" must be substantial and directly intended before it is constitutionally suspect.

Rutkowski, "Federal Aid for Higher Education," 79 *Commonweal* 40 (Oct. 4, 1963). Discusses opposition to federal aid to colleges and universities which are church-affiliated under the Higher Education Facilities Act of 1963.

Sutherland, "Establishment according to Engle," 76 *Harv. L. Rev.* 25 (1962). Discusses *Engle* and the problems posed by its interpretation of the establishment clause. Advocates judicial self-restraint in such church-state cases finding them to be inherently political, not judicial, questions.

Ward, "Changing Opinion of Federal Aid," 199 *Catholic World* 167 (June, 1964). Comment on the change of opinion of leaders in the fields of politics, education and law who now favor federal aid to church-related education.

Young, "Education Without Federal Aid: The Economic Pressure Upon Private Schools and Colleges," 27 *Vital Speeches* 492 (June, 1961). States the policy grounds against the acceptance of federal aid for college facilities construction.

NOTES & COMMENTS:

Comment, "Public Control of Private Sectarian Institutions Receiving Public Funds," 63 *Mich L. Rev.* 142 (1964). Discusses forms of judicial and legislative controls incident to the grant of federal aid to private sectarian institutions.

Comment, 21 *So. Cal. L. Rev.* 61 (1947). Emphasizing the difficulty presented by *Everson* in drawing the line as to what is allowed in the form of aid to sectarian affiliated schools once such aid is labeled public welfare legislation.

Note, "Higher Education Facilities Act: Constitutionality of Federal Financial Aid to Church-Related Colleges," 77 *Harvard L. Rev.* 1358 (1964). Discusses the constitutionality of the Act and the difficulties of obtaining judicial review. Under existing tests the Act is thought to be constitutional but, due to lack of precedent and the inconclusive nature of prior church-state cases, the provisions relating to federal aid to church-related colleges are considered an open question. Concludes that in spite of *Frothingham v. Mellon*, the nature of the questions presented by the Act make it an appropriate area for the Court to grant review.

Note, "The Free Exercise and Establishment Clauses, Conflict or Coordination?" 48 *Minn. L. Rev.* 929 (1964). Examines Mr. Justice Stewart's charge that the Supreme Court has been applying the establishment clause literally while using a "balancing of interests" approach to the free exercise clause. Concludes that although the Court has used absolute language that might indicate a literal approach to the establishment clause the case results reached have not been inconsistent with a balancing approach.

Note, "Student Grants and the Separation of Church and State," 12 *Syracuse L. Rev.* 387 (1961). Discusses the constitutionality of New York's program of public aid to students attending church-related colleges (N.Y. Sess. Laws 1961, Ch. 389) in light of both the federal and state constitutions.

Note, "Public Funds for Sectarian Schools," 60 *Harv. L. Rev.* 793 (1947). Discusses the extent and tradition of public aid to sectarian schools. *Everson* is found to be a failure as a predictive guide to what is a permissible form of public aid to church-related education.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 473

BOARD OF PUBLIC WORKS OF MARYLAND, ET AL.,
Petitioners

v.

THE HORACE MANN LEAGUE OF THE UNITED STATES OF AMERICA, INC., ET AL., *Respondents*

BRIEF OF THE ASSOCIATION OF AMERICAN COLLEGES AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

INTEREST OF THE AMICUS CURIAE

The Association of American Colleges appears before the Court as amicus curiae by reason of its interest in the resolution of the important Constitutional issues under the First and Fourteenth Amendments which have been raised in the Maryland Courts below.

The Association does not appear as the champion of any particular institutional interests but as a representative of the common interest in the form of under-

graduate education known as liberal education, wherever it may be found. The Association of American Colleges is the national organization of colleges of liberal arts and sciences, whether self-contained institutions or parts of complex universities. It admits to its membership any duly accredited institution, regardless of affiliation and governance, that devotes a substantial share of its resources to providing undergraduates with a liberal education as distinct from professional or vocational training.

The present membership of the Association in the U.S.A. (excluding four overseas institutions) comprises 869 colleges and universities. This represents over 90 percent of all accredited liberal arts colleges and nearly 60 percent of all degree-granting institutions in the United States. Of these 869, 56 percent (487 institutions) are officially classified as affiliated with one or other of the churches; 18 percent (155 institutions) are maintained by federal, state or local government, and 26 percent (227 institutions) are subject only to the authority of their own governing bodies and independent of any external control other than the public law.

All three of the colleges that are petitioners in the present action are members of the Association (as is Hood College which was a party to the case in the lower courts).

In addition to those colleges which as parties to this action are receiving state grants-in-aid the great majority of the member institutions of the amicus partici-

pate in the various federal programs of higher education. The Constitutional validity of many, if not all, of these programs as applied both to sectarian and nondenominational colleges and universities is at issue as the result of the decision of the Maryland Court of Appeals below.

The problems confronting these private institutions in providing the facilities to accommodate some part of a continually increasing college enrollment are substantial. The existence of this challenge is generally recognized in our society and requires little elaboration. What is needed, however, by the colleges is the certainty about the sources of assistance with which these institutions can plan to meet their responsibilities. In the light of the decision below, the Association respectfully urges the Court to give such direction for which there is immediate need by granting the petition for review.

The consents of both petitioners and respondents to the appearance of the Association as amicus have been filed with this brief.

ARGUMENT

I. The Issue Before the Court Is of Great Constitutional Significance and There Is Substantial Public Interest in Its Resolution.

The issue presented by the decision of the Court of Appeals of Maryland in this case is whether there is a Constitutional prohibition under the First and Fourteenth Amendments to the grant of funds by a state to private colleges for the construction of science and classroom buildings, dormitories and dining halls where such colleges are designated sectarian or denominational under certain tests prescribed by a court.

The amicus would subscribe to the characterization of this issue by petitioners and others as the most important unresolved question in the area of church-state relationships.

The substantial public interest in the settlement of this issue is rooted in the ultimate obligation of the state and federal governments together with private institutions to provide a rational program for meeting the educational needs of our people at the college and university level.

For a period beginning with the adoption of the Constitution itself, the State of Maryland has followed a clearly marked policy of supporting private as well as public institutions of higher learning. Presumably, the purpose was to encourage that pluralism which has been such a striking and vital characteristic of higher education in the United States. The support granted to private colleges and universities has been carefully restricted to non-religious purposes. In making these grants, the State of Maryland exhibited a strict neutrality not only between church related and non-church related institutions but also between the various religious denominations.

In response to current needs, programs of financial aid such as that undertaken by Maryland have been augmented by similar legislation by Congress, most notably The Higher Education Facilities Act of 1963, as amended by The Higher Education Act of 1965. Other legislation involving direct grants to private educational institutions without apparent regard to the degree of religious affiliation has been enacted since the earliest days of this republic.*

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* Ohio Company Land Sale Ordinance of July 23, 1787; Morrill Land Grant Acts 1862, 1890 (12 Stat. 503; 26 Stat. 417).

The validity of many of these programs in the Constitutional sense is brought into serious question by the decision below. The implementation of certain federal legislation requires the participation of state officials and thereby the disbursement of state funds. A divergence of opinion has arisen within the states concerning the Constitutional propriety of participation by state officials in these programs.* These differences can only be accentuated by the decision of the Maryland Court of Appeals which, by stipulating a number of factors for determining whether an institution is sectarian, has prescribed a type of religious litmus test for passing on the validity of a particular grant of aid. The difficulty in the administrative application of the tests laid down by the Maryland Court and the existence of other standards for determining recipients of public funds underline the urgency for resolution of this question.

To accommodate the expected increase in enrollment, considerable advance planning is required of the private colleges and universities to insure that the physical facilities are available at the appropriate time. The sources of funds to finance these projects are a matter of immediate concern. If the use of public funds is prohibited, other means must, if possible, be found. No part of the planning process can be carried out with the requisite precision where there is continued uncertainty in the interim about the availability of state and federal assistance.

In similar fashion, the authorities responsible for the adequacy of public institutions of higher education

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* Opinion of Department of Justice, State of Oregon, July 29, 1966.

need to know whether, through a program of financial assistance, they are entitled to rely on private institutions of a denominational character to bear a reasonable share of the burden of meeting the increasing demand for higher education.

II. The Standards Imposed by the Court Below for the Resolution of the Constitutional Issue Are Not in Accordance With the Decisions of This Court and Their Application Will Not Resolve the Question of Public Aid to Church-Related Institutions.

Having determined that the purposes of the Maryland statutes granting construction funds were secular in nature, the Court of Appeals purported to decide whether the operation of the statutes was primarily religious in effect. This inquiry was resolved by the Court through an examination of the degree of petitioners' religious orientation and the extent of their religious affiliations.

The manner of determining the effect of a statute or other official action for purposes of the First and Fourteenth Amendments seems sufficiently circumscribed in the decisions of this Court. In *Abington School District* v. *Schempp,* 374 U.S. 203 (1963) the inquiry was concerned with whether the statute effectively advanced or inhibited religion. Other opinions of the Court have suggested that consideration must be given to the possibility of attaining secular objectives without resort to religious organisms or through a course of action which does not advance religious objectives simultaneously with the achievement of the secular goals. *McGowan* v. *Maryland,* 366 U.S. 420 (1961) (opinions of the Court and Mr. Justice Frankfurter, concurring). These opinions of the Court considered together presuppose a test of public assistance to

higher education under the First and Fourteenth Amendments which is not merely confined to an examination into the recipients of such aid and the existence or the nature of their sectarian tendencies. In so limiting its investigation, the opinion of the Maryland Court was not consistent with the decisions of this Court.

The administrative problems posed by the opinion of the Maryland Court are readily apparent. The examination of the colleges involved in this case demonstrates that from both the organization and prevailing spirit of the institutions no common denominator can be effectively derived for measuring the sectarian level which places an institution, under the Constitution, beyond the reach of public assistance in any form. A wider survey of the colleges and universities constituting the membership of the amicus reinforces the conclusion.

Under the tests laid down by the Maryland Court of Appeals, an administrator of state or federal aid is faced with an impossible task if he must assess the purposes of a college in relation to religion in terms of their "fervent, intense or passionate nature".* If the decision of the Maryland Court is allowed to stand, these same administrators must either continue to apply or to re-evaluate their own criteria for qualified recipients of financial assistance in an atmosphere of growing uncertainty. An application of the standards prescribed by the decision below or a divergence from them in subsequent actions by other lower courts, state

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* *The Horace Mann League of the United States of America, Inc., et al.* v. *Board of Public Works of Maryland, et al.*, 242 Md. 645, 675, 220 A. 2d 51, 67 (1966).

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IN THE

Supreme Court of the United States

October Term, 1966

No. 590

THE HORACE MANN LEAGUE OF THE UNITED STATES OF AMERICA, INC., *et al.*,

Appellants,

v.

BOARD OF PUBLIC WORKS OF MARYLAND, *et al.*,

Appellees.

On Appeal from the Court of Appeals of Maryland

JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

October Term, 1966

No. .....

THE HORACE MANN LEAGUE OF THE UNITED STATES OF AMERICA, INC., *et al.*,

Appellants,

v.

BOARD OF PUBLIC WORKS OF MARYLAND, *et al.*,

Appellees.

On Appeal from the Court of Appeals of Maryland

JURISDICTIONAL STATEMENT

Appellants appeal from so much of the final judgment of the Court of Appeals, entered on June 2, 1966 as affirmed the judgment of the Circuit Court of Anne Arundel County upholding the constitutionality of Chapter 88, Maryland Acts of 1962, which grants $500,000 to Hood College to help erect a dormitory and a classroom building. The Appellee Board of Public Works and three other colleges, defendants in the court below, have filed a petition in this Court for a writ of certiorari to review the remaining part of the judgment of the Maryland Court of

Appeals. *Board of Public Works of Maryland* v. *Horace Mann League of the United States,* October Term, 1966, No. 473.

Opinions Below

The opinion of the Circuit Court for Anne Arundel County is unreported. It is printed at pp. 58-79 of Volume I of the joint record extract filed in the court below and with this statement. It is also printed in Appendix B (p. 71a) to the petition in No. 473, to which the Court is respectfully referred. The opinion of the Court of Appeals of Maryland is reported in 242 Md. 645 and is printed in Appendix B (p. 17a) of No. 473.

Jurisdiction

The appellants herein duly filed in the Court of Appeals of Maryland their notice of appeal to this Court on August 15, 1966. The Court of Appeals is the highest court of the State of Maryland and its judgment, entered on June 2, 1966, is in all respects final.

Statute Involved

The statutory provision involved is Chapter 88 of the Acts of the General Assembly of Maryland of 1962. It is printed in the appendix to this Statement.

The Question Presented

May a state, consistently with the First and Fourteenth Amendments to the United States Constitution, grant tax-raised funds for the erection of a dormitory and classroom building by a church-related college whose stated purposes are religious and which characterizes itself as "Christian" and "religiously oriented?"

Statement of the Case

This action was commenced by the Horace Mann League, a non-profit corporation organized for the purpose of fostering and strengthening the American public school system, and thirteen individual taxpayers challenging the validity, under both the Maryland and federal constitutions, of four separate bills enacted by the Maryland legislature to aid four sectarian colleges.

In respect to Hood College, the trial evidence showed the following (references are to the joint record extract):

Its stated purposes are religious and it characterizes itself as "Christian" and "religiously oriented" (E. 212-13, 1317-25). More than 20% of the governing board are appointed by the United Church of Christ and members of that church account for half the board (E. 1105-06, Ans. to Inter. 11). Only one non-Protestant has served on the board since 1958 (Ans. to Inter. 11). The administration is Protestant, with a heavy proportion of U. C. C. members (E. 536). The faculty is largely Protestant, and sympathy with the religious ideals of the college is a require-

The Question Presented is Substantial

At least four times within the past two decades this Court has expressed the basic principles applicable to this case in the following words:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. *No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.* Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State." (Emphasis supplied.) (*Everson* v. *Board of Education*, 330 U. S. 1, 15-16; *McCollum* v. *Board of Education*, 333 U. S. 203, 210-211; *McGowan* v. *Maryland*, 366 U. S. 420, 443; *Torcaso* v. *Watkins*, 367 U. S. 488, 492-493.)

In the latest relevant decision, *School District of Abington Township* v. *Schempp*, 374 U. S. 203, the Court not only quoted this authoritative paragraph in part, but also

quoted with approval the following from the dissenting opinion of Mr. Justice Jackson in the *Everson* case:

> There is no answer to the proposition * * * that the effect of the religious freedom Amendment to our Constitution was to take every form of propagation of religion out of the realm of things which could directly or indirectly be made public business and thereby be supported in whole or in part at taxpayers' expense. * * * This freedom was first in the Bill of Rights because it was first in the forefathers' minds; it was set forth in absolute terms, and its strength is its rigidity. (374 U. S. at 215.)

The Maryland Court of Appeals recognized that these principles are determinative of the question in this case; it quoted both the authoritative paragraph and the statement of Mr. Justice Jackson. It applied these principles to declare invalid the grants to the other three colleges, but it held that they do not require a similar determination in respect to Hood College.

We respectfully submit that in this the Court of Appeals was in error. The grant to Hood College does constitute aid to religion and is a tax to support religious activities and a religious institution. It does seek to make the propagation of religion public business supported in part at taxpayers' expense. The Court of Appeals justifies its decision on the ground that "The College's stated purposes in relation to religion are not of a fervent, intense, or passionate nature, but seem to be based largely upon its historical background." (Petition for certiorari in No. 473, p. 43a.) We believe the court below erred in

failing to take the College's own evaluation at its face value; the evidence presented at the trial overwhelmingly supports such evaluation.

Conclusion

The federal question presented by this appeal is substantial and of public importance. It is therefore respectfully submitted that probable jurisdiction should be noted.

Respectfully submitted,

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APPENDIX

CHAPTER 88

(House Bill 86)

AN ACT to authorize the creation of a State debt in the aggregate amount of Five Hundred Thousand Dollars ($500,000), for the purpose of aiding in the construction of a new dormitory, AND a new classroom building ~~and the modernization of the dining room~~ on the campus of Hood College, in Frederick, Maryland, subject to the requirements that the said college on or before January 1, 1964, shall have obtained elsewhere at least an equal and matching sum for the same purposes; and providing generally for the issue and sale of certificates of indebtedness evidencing such loan.

WHEREAS, Hood College in the City of Frederick, has had a long and distinguished career in higher education in this State, having for many years contributed heavily to the education of young women in the State of Maryland; and

WHEREAS, the College urgently needs a new dormitory, new classroom building and the modernization of its dining room; and

WHEREAS, a State appropriation if matched by the College would assure the construction of these needed facili-

EXPLANATION: *Italics indicate new matter added to existing law.*
[Brackets] indicate matter stricken from existing law.
CAPITALS indicate amendments to bill.
Strike out indicate matter stricken out of bill.

ties and at the same time help to relieve the burden of heavy enrollment in the several State-owned colleges in Maryland, now, therefore,

SECTON 1. *Be it enacted by the General Assembly of Maryland,* That the Board of Public Works is hereby authorized and directed to issue a State loan to be known as the "Hood College Loan of 1962", in the aggregate sum of Five Hundred Thousand Dollars ($500,000).

The certificates evidencing said loan may be issued all at one time or, in groups, from time to time, as hereinafter provided. All of said certificates evidencing said loan, or any group thereof, shall be issued according to what is known as the serial annuity plan so worked out as to discharge the principal represented by said certificates within fifteen (15) years from the time of its issue; provided, however, that it shall not be necessary to provide for the redemption of any part of the principal represented by any certificates for the first two (2) years from the time of the issuance of said certificates.

The Board of Public Works shall, and is hereby authorized and empowered to, pass a resolution or resolutions from time to time, determining and setting forth:

(a) The proportion of the total loan authorized by this Act which shall be issued at any particular time;

(b) The form of the certificates representing the loan or any part thereof so authorized to be issued at any particular time, including any interest coupons to be attached thereto, and provisions for the issuance of certificates in

registered form, provisions for the registration of any coupon certificates as to principal of loan and for the reconversion into coupon certificates of any certificates registered as to principal.

(c) The denomination or denominations of the certificates to be issued at any particular time, which may be not less than One Hundred Dollars ($100) but may be in sums of One Hundred Dollars ($100) or any suitable multiple thereof, and the place or places of payment of principal and interest thereof.

(d) The rate of interest of the certificates to be issued at any particular time not exceeding in any case 4% per annum, payable semi-annually.

(e) The date of the certificates issued at any particular time, and within the limits prescribed by Article III, Section 34 of the Constitution of Maryland the redemption dates of said certificates.

The resolution authorizing the issuance of said loan or any portion thereof shall set forth in detail the dates when any of the certificates representing said loan or any portion thereof are to be redeemed and the amount to be redeemed upon such dates, respectively, according to the serial annuity plan applied to said loan as a whole or to the group of certificates evidencing a part of said loan issued at a particular time, as the case may be. Said loan and certificates and every part thereof and the interest payable thereon shall be and remain exempt from State, County and municipal taxation.

SEC. 2. *And be it further enacted,* That the Board of Public Works is hereby authorized and directed to have prepared proper Certificates of Indebtedness of the State in good and sufficient form to aggregate the amount of Five Hundred Thousand Dollars ($500,000), as evidence of such loan; such Certificates of Indebtedness shall bear date as of the time of their issue as provided in Section 1 of this Act. Each of said certificates shall be signed and countersigned in the manner prescribed by Section 3 of Article VI of the Maryland Constitution.

SEC. 3. *And be it further enacted,* That in order to provide for the selling of the Certificates of Indebtedness aforesaid, to be issued under the provisions of this Act, the Board of Public Works is hereby directed to advertise once before the said Certificates of Indebtedness, or any part thereof, shall be issued, in two newspapers published in the City of Baltimore and in such other manner as the Board of Public Works in its discretion may determine, that the Treasurer of this State will be in readiness at a time within twenty (20) days after expiration of said notice to receive bids at such place or places as may be named in said respective advertisements for bonds or Certificates of Indebtedness issued under the provisions of this Act, under such regulations as may be made in the discretion of the Board of Public Works; and the accrued interest between the date of the bonds or Certificates of Indebtedness and the time of sale and delivery of and payments for said bonds or Certificates of Indebtedness shall be adjusted with the purchaser thereof under such regulations as may be made in the discretion of the Board of Public Works; and

upon the day mentioned in said advertisement as the day for opening the bids for the proposals thereby called for, they shall receive such sealed proposals for the purchase of as many of such bonds or Certificates of Indebtedness as may be mentioned or designated in said advertisements; and on the opening of such sealed proposals, as many of said bonds or Certificates of Indebtedness as have been so bid for shall be awarded by the Board of Public Works, to the highest responsible bidder or bidders therefor for cash, if the prices bid are adequate, in the judgment of the Board of Public Works, and when two or more bidders have made the same bid, and such bid is the highest and the Certificates so bid for by the highest responsible bidder are in excess of the whole amount of the Certificates offered for sale, such bonds or Certificates of Indebtedness shall be awarded to such responsible bidders bidding the same price in a ratable proportion; or if any insufficient price be bid for them, they may be subsequently disposed of under the direction of the Board of Public Works at a private sale upon the best terms they can obtain for the same; provided, they shall not be sold at private sale for less than par and accrued interest.

SEC. 4. *And be it further enacted,* That the sum of Ten Thousand Dollars ($10,000), or so much thereof as may be necessary, shall be paid by the Treasurer of the State upon the warrant of the Comptroller out of the proceeds of the sale of said bonds or Certificates of Indebtedness, for the payment of the expense of engraving, printing and other outlays connected with the issue of the loan hereby authorized, and for the payment of the advertising directed

by this Act, and all other incidental expenses connected with the execution of its provisions in connection with said loan.

SEC. 5. *And be it further enacted,* That the actual cash proceeds of the sale of the Certificates of Indebtedness to be issued under this Act shall be paid to the Treasurer of the State upon the warrant of the Comptroller and such proceeds shall be used exclusively for the following purposes, to wit:

The Comptroller shall immediately upon the sale of and payment for said certificates, first return to and credit the Treasury for a sum equivalent to the amount expended as provided for in Section 4 of this Act; the remainder of the proceeds of said loan shall be credited on the books of the State Treasury Department, to be expended as needed by the State, upon approval by the Board of Public Works, for the construction of a new dormitory, a new classroom building, and the modernization of the dining room on the campus of Hood College in Frederick, Maryland.

SEC. 6. *And be it further enacted,* That the payment of any funds under the provisions of this Act toward the cost of construction of a new dormitory, AND a new classroom building, ~~and the modernization of the dining room~~ on the campus of Hood College in Frederick, Maryland, shall be contingent upon the provision by Hood College of at least an equal and matching fund from other sources. The said College shall have until January 1, 1964, to present evidence satisfactory to the Board of Public Works that it has raised at least this equal and matching fund

toward the construction of a new dormitory, AND a new classroom building, ~~and the modernization of the dining room~~. Upon receiving from the Board of Public Works a certification of such suitable evidence on or before January 1, 1964, the Treasurer of the State is hereby authorized, empowered and directed to proceed to spend the proceeds of said loan agreeably to the other provisions of this Act. If such satisfactory evidence of the raising of at least an equal and matching fund is not present to the Board of Public Works on or before January 1, 1964, no funds under the provisions of this Act shall thereafter be paid over to or expended for the construction of a new dormitory, AND a new classroom building, ~~and the modernization of the dining room~~ on the campus of Hood College in Frederick, Maryland.

SEC. 7. *And be it further enacted,* That until all of the interest on and principal of any certificates issued under this Act have been paid in full, there is hereby levied and imposed an annual State tax on each $100 of assessable property at the rate to be determined in the following manner: on or before December 1, 1962, and on or before December 1 in each calendar year thereafter, the Board of Public Works shall certify to the governing bodies of each of the Counties and Baltimore City the rate of State tax on each $100 of assessable property necessary to produce revenues to meet all interest and principal which will be payable to the close of the next ensuing calendar year on all certificates theretofore issued or theretofore authorized by resolution of the Board of Public Works to be issued,

and the governing bodies of each of the Counties and Baltimore City shall forthwith levy and collect such tax at such rate.

All matters committed by this Act to the discretion of the Board of Public Works shall be determined by a majority of said Board.

SEC. 8. *And be it further enacted,* That this Act shall take effect June 1, 1962.

Approved March 23, 1962.

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Appellants,

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BOARD OF PUBLIC WORKS OF MARYLAND, ET AL.,
Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

MOTION TO DISMISS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 590

THE HORACE MANN LEAGUE OF THE UNITED STATES OF AMERICA, INC., ET AL.,
Appellants,

v.

BOARD OF PUBLIC WORKS OF MARYLAND, ET AL.,
Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

MOTION TO DISMISS

Appellees, Board of Public Works of Maryland and Hood College of Frederick, Maryland, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that appellants' appeal from the final judgment of the Court of Appeals of Maryland entered on June 2, 1966, be dismissed on the ground that the appeal presents no substantial federal question.

STATEMENT OF THE CASE

Appellants have appealed from that part of the final judgment of the Court of Appeals of Maryland which affirmed the judgment of the Circuit Court for Anne

Arundel County upholding the constitutionality of Chapter 88 of the Laws of Maryland, 1962. Chapter 88 provides for the sale of certificates of indebtedness of the State of Maryland and for the payment of the net proceeds of the sale to Hood College on a matching-fund basis for the construction of a dormitory and classroom building. Before the certificates of indebtedness had been issued, appellants filed a bill of complaint in the Circuit Court for Anne Arundel County challenging the validity of this statute and three others which provide on similar terms, for the payment of funds to Saint Joseph College of the Daughters of Charity of Saint Vincent de Paul, Inc. (Saint Joseph College); the College of Notre Dame of Maryland, Inc. (College of Notre Dame) and Western Maryland College for the construction of academic facilities.

The trial court held that no provision of either the state or federal constitution prohibits any of the grants and dismissed the bill. The Court of Appeals in a 4-3 decision held that Saint Joseph College, College of Notre Dame and Western Maryland College were sectarian in a legal sense under the First Amendment, and may not constitutionally receive the grants. (242 Md. 645 at 678 and 684.) A petition for certiorari docketed as No. 473 October Term, 1966 and presently pending, has been filed by the Board of Public Works and these three colleges. However, the Court of Appeals unanimously agreed with the trial court that the legislature might validly appropriate funds for the construction of educational facilities at Hood College, the majority reasoning that the institution, while affiliated with a particular religious denomination, was not "sectarian." (242 Md. at 675 and 700).

STATEMENT OF FACTS

In his opening statement, counsel for the appellants conceded that appellants' case against Hood "rests upon the fact that Hood College requires compulsory religious chapel attendance," and were it not for such the "case against [Hood] would probably fail, because they would then be in the category not unlike Columbia, Harvard, Yale [and] Princeton. . . ." (E. 80)* The trial court found that,

> "As to Hood, the only religious connection appears to be a United Church [of Christ] Chaplain, and 7 United Church Trustees in a Board of 30** members. Two semester hours out of 124 are required in an objective study of the Bible and some attempt is made to require the students to attend 14 evening services in the Chapel and 7 Sunday services also in the Chapel per semester, less 6 cuts permitted for both. At the services, ordained Ministers of various denominations act as speakers." (E. 75)

The Court of Appeals summarized the facts with respect to Hood College as follows:

> "According to the College Bulletin issued in 1963, Hood is 'an independent liberal arts college for women,' and it 'is church related through its affiliation with the United Church of Christ [U.C.C.], but welcomes students of all religious faiths.' It is listed in a Tabulation of the Danforth Foundation of Institutions Associated with Religious Bodies as 'reflecting religious orientation.' It is a small college, limited to an enrollment of about 650 students, and

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* Reference is to the joint record extract filed by appellants with their Jurisdictional Statement.

** Refers to actual number of functioning trustees prior to institution of suit. (E. 535)

is governed by a Board of Trustees consisting of 35 members. Seven of these are elected by agencies of the U.C.C.; 22 by the Board itself; and 6 by the Alumnae Association from its membership. The President is selected by the Board, and the President, after screening by appropriate college officials, selects the administrative personnel. Faculty members are usually located by the chairman of the department where a vacancy occurs. They are selected upon an analysis of their academic credentials, qualifications, and earned degrees, and their 'character and congeniality.' There are no sectarian requirements for members of the faculty; the President thought that Hood had 'virtually all shades of religious affiliations represented [thereon] and non-religious affiliation.' In the year 1963-1964, there were 7 Episcopalians, 2 of the Jewish faith, 3 Lutherans, 6 Methodists, 1 with no affiliation indicated, 13 Presbyterians, 2 listed as Protestant but non-denominational, 5 Roman Catholics, 3 members of the Society of Friends, 3 Unitarians, and 10 members of the U.C.C., a rather heterogeneous faculty for a sectarian school.

"There is no requirement that any member of the officers of administration be of any particular religious denomination, and, in fact, the officers of administration do not represent any particular church or religious body. Included among these are Baptists, Lutherans, Methodists, Presbyterians, one Roman Catholic and one Unitarian, and 7 members of the U.C.C.

"There is no requirement that the Chaplain, who supervises, generally, the religious lives of the student body be of any particular denomination, although the present one is a member of the U.C.C.

"The student body is primarily selected according to educational records supplied by the students and

by the schools from whence they come; there is absolutely no requirement based on race, creed, color, or sectarian affiliation in the student body. An examination of their religious affiliation for the year 1963-64 shows such a diversification that it would unduly prolong this opinion to include them all. Among a student body of some 675 students, were included 146 Episcopalians, 29 Jewish students, 83 Methodists, 72 Roman Catholics, 108 Presbyterians, and 89 members of the U.C.C.

"The college confers only two earned degrees; the A.B. degree, which is, of course, a liberal arts degree; and the B.S. degree in Home Economics. It has a department of religion and philosophy; the courses taught therein are conducted in the same manner as the courses in other departments. These courses are not geared to aiding the Protestant religions or any other; they are primarily historical studies in religion and 'there is absolutely no attempt at indoctrination in any way.' The President was emphatic in stating that he believed proselytizing had no place in higher education. The professors in the religious field are not confined to members of the U.C.C. or to Protestants. In addition, there is no attempt by the U.C.C., or any other group, to select texts or to offer suggestions as to which texts should be used, and there are no courses in religion or philosophy, or anywhere else in the curriculum, which are designed to train for the ministry or religious work. The requirements for attendance at chapel (indeed, if they may be termed requirements from the evidence) do not call for frequent services, with the student being allowed generous 'cuts' without excuse. On the Wednesday evening services, of which there are approximately 15 per semester, clergymen of various denominations come in and talk to the students. These include Protestants, Roman Catholics, Jewish Rabbis, and a

Humanist (the President of Hood, after listening to him, being unable to state what his religious preference was). This same general pattern is followed for the Sunday evening services, but not to the same extent as the services on Wednesday evenings. The students are encouraged to maintain ties with the churches of their own denomination while at the college, and each Sunday morning they are released for the purpose of going to such churches in the locality.

"In the year mentioned above, the U.C.C. contributed 2.2% of the college's total operating budget; but contributed nothing in the way of capital gifts, with the exception of one gift in the amount of $10,000 for endowed scholarships.

"The college has a 'very loose relationship' with the Council for Higher Education of the U.C.C., all of the church-related colleges related to the U.C.C. automatically becoming members of the Council.

"During the summers the college permits various civic and religious groups to utilize their campus for programs for which modest charges are made. The school has no control over the programs, and, as far as the record discloses, the programs are not confined to church affairs or to any particular denominations.

"The facilities to be housed by the grant herein involved will be a new academic building and a dormitory; no religious activities will be conducted therein." (242 Md. at 672-75.)

Based on these facts which were undisputed, the majority of the Court of Appeals concluded that Hood College was not "sectarian" and therefore held, under the test adopted by that court, that Hood College could receive the grant named in the act.

ARGUMENT

Appellants' argument in support of its claim that the grant provided for in Chapter 88, Laws of Maryland, 1962 violates the "establishment" clause of the First Amendment to the federal constitution is based upon the claim that Hood College is a "sectarian" institution, and as such may not receive the grant. Appellees agree with the petitioners in No. 473 that this issue — whether public funds can be appropriated to a sectarian college for secular purposes — does present a substantial federal question. However, the trial court's findings of fact and the findings of fact of the Court of Appeals make it perfectly clear that Hood College is not sectarian.

In an attempt to prove the sectarian character of Hood College, appellants assert here, as they did in the state courts, that it is necessary to review and analyze a variety of data about the institution including the religious affiliation of trustees, administrative officers, faculty and student body; the sources of financial support; the curriculum, textbooks and other required reading; the form and content of the instruction given; the nature of the extracurricular activities of students; the physical characteristics of the buildings; the official and unofficial publications of the institution and of various organizations with which it is connected, including its alumnae bodies; the activities of its graduates; and from all these and other data to make a determination as to whether the institution is sectarian. Extensive documentary and oral evidence was introduced by the appellants and the appellees with respect to these items.

Both the trial court and the Court of Appeals weighed the evidence with respect to the factors noted and made

the findings of fact above quoted. These findings, supported by the uncontradicted evidence in the case should be accepted on this appeal. *Watts v. Indiana,* 338 U.S. 49. See Jaffe, *Judicial Review: Constitutional and Jurisdictional Fact,* 70 Harv. L. Rev. 953 (1957). Based on these facts the Court of Appeals, after adopting the "sectarian" test urged by appellants, and after finding College of Notre Dame, Saint Joseph College and Western Maryland to be sectarian, found that Hood College was not sectarian.

Appellees do not concede that the "sectarian" test is the proper one to be applied in this case. However, assuming for purposes of this motion that it is, this appeal does not present a substantial federal question since the findings clearly demonstrate that Hood College is not sectarian and does not materially differ from admittedly secular institutions.

CONCLUSION

For the reasons stated above, this appeal should be dismissed.

Respectfully submitted,

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